IN THE MATTER OF

STIHL, INCORPORATED, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9165. Complaint, March 7, 1983—Decision, June 6, 1983

This consent order requires a manufacturer and seller of power tools and its advertising agency, amonth other things, to cease representing that the Stihl 015 AV chain saw has been top-rated by a leading consumer publication; that power was one of the factors considered in the rating; and that Stihl chain saws start faster and run smoother than other chain saws. The order prohibits respondents from making false or unsubstantiated representations concerning the performance or durability of any power tool, and requires them to possess and rely upon a reasonable basis when making such claims. Further, the companies are barred from misrepresenting the purpose or conclusion of any test or evaluation, and are required to retain documentation for performance-related claims for a period of three years.

Appearances

For the Commission: *Andrew Sacks* and *T. Bringier McConnell.*

For the respondents: *William I. Bandas,* Richmond, Va. and *Stephen Wainger, Seawell, Dalton, Hughes & Timms,* Norfolk, Va.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Stihl, Inc., a corporation, and Stuart Ford, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Stihl, Inc. ("Stihl"), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware. Its office and principal place of business is located at 536 Viking Drive, Virginia Beach, Virginia. Respondent Stuart Ford, Inc. ("Stuart Ford"), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia with its office and principal place of business located at 1108 E. Main Street in Richmond, Virginia.

PAR. 2. Stihl is now and at all times relevant to this complaint has

been engaged in the marketing and sale of chain saws and other power tools, and power tool accessories. Stuart Ford is an advertising agency and has prepared, created and placed advertisements for Stihl chain saws and other Stihl power tools.

PAR. 3. Respondents have caused to be prepared and placed for publication and have caused the dissemination of advertising and promotional material, including but not limited to, the advertising referred to herein, to promote the sale of Stihl chain saws and other Stihl power tools.

PAR. 4. Respondents maintain and have maintained a substantial course of business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of their business, and for the purpose of promoting the sale and distribution of Stihl chain saws, respondents have disseminated and caused the dissemination of advertising in national magazines distributed by mail and across state lines, and in television stations located in various states, having sufficient power to carry such broadcasts across state lines.

PAR. 6. Typical statements and representations in said advertisements and promotional materials, disseminated as previously described, but not necessarily inclusive thereof, are found in advertisements attached hereto as Exhibits A, B, C, D, and E.

PAR. 7. Through the use of the statements referred to in Paragraph Six and other statements contained in advertisements not specifically set forth herein, respondents have represented, and now represent directly or by implication, the following claims:

a) In 1980 and 1981, the current Stihl model 015 AV chain saw was rated best of all home saws tested by a leading consumer publication; and that "power" was one of the factors considered in this rating.

b) Stihl chain saws start faster than all other chain saws on the market.

c) Stihl chain saws are the smoothest running chain saws on the market.

d) All Stihl power tools last at least twice as long as any other power tool on the market.

PAR. 8. Through the use of the advertisements referred to in Paragraph Six, and other advertisements not specifically set forth herein, respondents have represented, directly or by implication, that they possessed and relied upon a reasonable basis for the representations set forth in Paragraph Eight at the time of the initial dissemination of the representations and each subsequent dissemination. In truth and in fact, respondents did not possess and rely upon a reasonable basis for making such representations, for the following reasons:

a) (1) The test by a "leading consumer publication" was three years old at the time the claim was first made and the results were not properly applicable to the advertised models, because, inter alia, significant changes affecting performance were made in the tested competing saws.

(2) Power was not one of the factors considered in the test.

b) The data which Stihl relied upon do not show that Stihl saws start faster than all other saws on the market.

c) The data which Stihl relied upon do not show that Stihl saws run smoother than all other saws on the market.

d) The data which Stihl relied upon do not show that all Stihl power tools last twice as long as any other power tools on the market.

Therefore, respondents' making and dissemination of said representations, as alleged, constituted and now constitute unfair and deceptive acts or practices.

PAR. 9. At the time respondents made the representations alleged, respondents did not possess and rely upon a reasonable basis for making such representations. Therefore, respondents' making and dissemination of said representations, as alleged, constituted and now constitute unfair and deceptive acts or practices.

PAR. 10. The representations recited in Paragraph Eight (a), (b) and (c) are false, for the following reasons:

(a) (1) The rating by a consumer publication, published in 1977, did not involve current model chain saws in 1980 and 1981.

(2) The rating by a consumer publication, published in 1977, was not properly applicable to current model chain saws in 1980 and 1981.

(3) Power was not one of the factors considered in the test.

(b) Stihl chain saws do not start faster than all other chain saws on the market.

(c) Stihl chain saws are not the smoothest running chain saws on the market.

As the representations referred to above are false, the advertisements referred to above were therefore unfair and deceptive.

PAR. 11. Respondent Stuart Ford knew or should have known that the aforesaid advertisements were false, and therefore unfair and deceptive.

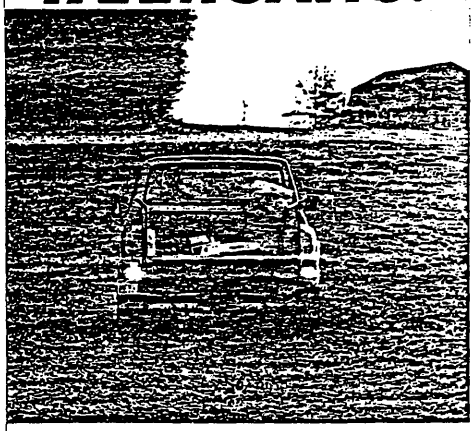
PAR. 12. The use by respondents of the aforesaid unfair and deceptive advertisements and the placement of them in the hands of others who have used them, have had the capacity and tendency to mislead consumers into the erroneous and mistaken belief that said representations are true and complete, and have had the capacity and tenden-

cy to induce such persons to purchase Stihl chain saws by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts or practices of respondents, herein alleged as aforesaid, were and are all to the prejudice and injury of the public, and constituted and now constitute unfair and deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

EXHIBIT A

FARMERS START BEFORE EVERYONE ELSE. SO DO STIHL FARM SAWS.



Stihl® farm saws are designed to start every time, in sweltering heat or freezing cold. And they last. Not just a season, but year after year.

Take the Stihl Farm Boss™, our biggest, most popular farm saw. With high-voltage ignition, a super-efficient combustion chamber and a cooling system that virtually eliminates vapor lock, it has starting power that'll get you going under any cutting conditions.

Or the new 032. Like all our farm saws, it's made to be trouble free. It has longer wearing parts that seldom break down, and automatic oiling so you never have to manually lubricate a chain.

And the Stihl Wood Boss™. It always gets the job done. Because every Stihl is built to last at least twice as long as any other saw you can buy. So for a farm saw you can depend on, get a Stihl. It's the one saw that'll help you get an earlier start.

And an earlier finish.

For your local dealer's name call toll-free 1-800-528-8050 Ext. 1430. In Arizona call 1-800-352-0458 Ext. 1430.

STIHL

The World's Largest Selling Chain Saw.

EXHIBIT B


FARMERS START BEFORE EVERYONE ELSE.
SO DO STIHL® FARM SAWS.
Stihl farm saws are designed to start every time, in sweltering heat or freezing cold. And they last. Not just a season but year after year.
Take the Stihl Farm Boss™, our biggest, most popular farm saw. With high-voltage ignition, a super-efficient combustion chamber, and a cooling system that virtually eliminates vapor lock, it has starting power that'll get you going under any cutting conditions.
Or the new 032. Like all our farm saws, it's made to be trouble free. It has longer wearing parts that seldom break down, and automatic oiling so you never have to manually lubricate a chain.
And the Stihl Wood Boss™. It always gets the job done.
Because every Stihl is built to last at least twice as long as any other saw you can buy.
So for a farm saw you can depend on, get a Stihl. It's the one saw that'll help you get an earlier start.
And an earlier finish.
For your local dealer's name call toll-free 1-800-528-6050 Ext. 1430. In Arizona call 1-800-352-0458 Ext. 1430.
Stihl Wood Boss
Stihl 032
Stihl Farm Boss
STIHL
The World's Largest Selling Chain Saw.

EXHIBIT C

IF YOUR TOOLS ARE LESS THAN PAMPERED THEY'D BETTER NOT BE LESS THAN STIHL®

Tough jobs. Muddy fields. Freezing cold or blistering heat. Rough handling. Time stop, a tool before it starts, and keep a job from getting done. Unless your tools are Stihl®.

All our tools are built to last at least twice as long as any other tools you can buy. And start under any conditions. So, no matter how long a job lasts, your Stihl tools will last longer.

That means less worry, less maintenance, and less down-time for you. So if your tools have it tough, they'd better not be less than Stihl.

©Stihl Inc., 1981 For sales and service, see the Yellow Pages under "saws." For your local dealers name call toll-free 1-800-528-6050, Ext.1430. In Arizona 1-800-352-0458, Ext. 1430.

STIHL®

The World's Largest Selling Chain Saw.

EXHIBIT D

CAN THE WOMAN WHO PICKS OUT YOUR TIES BE TRUSTED TO PICK OUT YOUR CHAIN SAW?

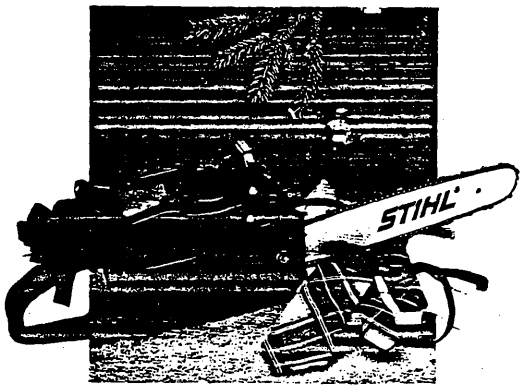
Of course. But unless your lady is a woodcutter, how can she be expected to know that a bargain saw is not necessarily a long lasting one? You can put your mind at ease, if you simply ask her for a Stihl® chain saw.

Stihl is the world's largest selling chain saw because Stihl saws start faster, run quieter and smoother, and hold up longer than other saws.

Each of the over eight thousand Stihl dealers throughout the country services the saws he sells. You won't find that kind of support when your bargain saw quits.

And considering that you get over $45 worth of accessories with the purchase of any 010 or 015 "Bonus Special," Stihl is also capable of cutting a good deal. So, if you want a chain saw for Christmas, you've basically got two choices. Either ask your wife for a Stihl.

Or brace yourself for a bargain.



STIHL®

The World's Largest Selling Chain Saw

BIG DEAL FROM STIHL. With the purchase of any 010 or 015 "Bonus Special" you receive over $45 worth of accessories at participating dealers. Deal includes matching carrying case, spare cutting chain, bar groove cleaning tool, file and handle, wedge, 8 in. bar, oil engine cu. wrench, owner's manual and owner booklet about firewood cutting. Standard equipment with all Stihl saws.

For your local dealer's name call toll-free 1-800-528-8050 Ext. 430. In Arizona call 1-800-352-1456 Ext. 430. For sales and service see the Yellow Pages under "Saws, Chain."

EXHIBIT E

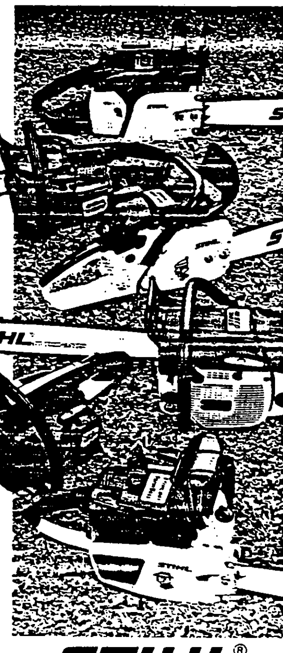
COMPARE THESE TO ANY OTHER SAWS AND LET THE CHIPS FALL WHERE THEY MAY.

Once you know one chain saw from another, you'll know why Stihl® is the largest selling chain saw in the world.

The Stihl 010AV. Lightweight homeowner's saw, built to professional standards. 2.3 cubic inches of power packed in an almost indestructible magnesium housing. Comes with Stihl's anti-vibration system. The quietest gas chain saw on the market today.

The Stihl 038AVE. New Stihl pro logging saw, designed to perform especially well — even in hot climates. Heat-resistant features include special air-flow channels, a two stage air filter, and a carburetor that significantly reduces vapor lock.

The Stihl 015 AV. Rated by a leading consumer publication as best of all home saws tested for combined power, performance, noise, cutting speed, balance, and fuel efficiency. The ideal saw for any job around the house.



The Stihl 032AVE. Stihl's ultimate mid-size saw. Strong enough for professional forestry, contracting and farm use. Incorporates Stihl's best pro features, such as anti-vibration and electronic ignition. The newest and most powerful mid-size saw Stihl makes.

The 028 Stihl Wood Boss.™ Stihl's most advanced mid-size saw in a popular price range. The only Stihl saw of its size with single-lever Master Control™ combining choke, start, and stop. Great for serious fire-wood cutting.

The Stihl Farm Boss.™ Tough, reliable saw built for a farmer's long hours and demanding jobs. Strong enough for medium logging, yet light enough for limbing, clearing, and thinning. A sure-starting, time-proven favorite.

STIHL®

The World's Largest Selling Chain Saw

For the name of the Stihl dealer nearest you [illegible]

Decision and Order

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter, having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 3.25(f) of its Rules;

Now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Stihl, Incorporated, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 536 Viking Drive, in the City of Virginia Beach, State of Virginia. Respondent Stuart Ford, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its office and principal place of business located at 1108 East Main Street, in the City of Richmond, State of Virginia.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Stihl, Inc., ("Stihl"), and Stuart Ford, Inc., ("Stuart Ford"), corporations, and their successors and assigns, and respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of any chain saw for consumer or commercial use in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, contrary to fact, that:

A. (1) The current Stihl model 015 AV chain saw is rated best of all home saws tested by a leading consumer publication;

(2) Power was one of the factors considered in the test by a leading consumer publication.

B. Stihl's chain saws start faster than all other chain saws on the market.

C. Stihl's chain saws are the smoothest running chain saws on the market.

II

It is further ordered, That respondents, their successors and assigns, and respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of any power tool, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting in any manner, directly or by implication, the purpose, content, results, current validity, reliability, or conclusions of any test or evaluation.

III

It is further ordered, That respondents, their successors and assigns, and respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any power tool, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representations, directly or by implication,

regarding the performance or durability of any such product unless, at the time the representation is made, respondents possess and rely upon a reasonable basis. For purposes of this Order a reasonable basis shall consist of one or more competent tests or other competent and reliable evidence that substantiates the representation.

Provided, however, That in circumstances where Stuart Ford relied upon scientific or professional tests, analyses, research, studies, or any other evidence based on expertise of professionals in the relevant area, which was not directly or indirectly prepared, controlled, or conducted by respondent Stuart Ford, Inc., it shall be an affirmative defense to an alleged violation of Part III of this Order for Stuart Ford to prove that it reasonably relied on the expert judgment of its client or of an independent third party in concluding that it had a reasonable basis in accordance with Part III of this Order. Such expert judgment shall be in writing signed by a person qualified by education or experience to render the opinion. Such opinion shall describe the contents of such evidence upon which the opinion is based.

IV

It is further ordered, That respondents, for the period of three years after they last disseminated the advertisements of the products covered by this Order, shall retain all test results, data and other documents or information on which they relied for such advertisements and all documentation which contradicts, qualifies or calls into serious question any claim included in such advertisements which were in respondents' possession during either creation or dissemination of such advertisements. Such records shall be available for inspection by the staff of the Commission upon reasonable notice.

V

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the Order.

VI

It is further ordered, That the respondents shall forthwith distribute a copy of this Order to each of its operating divisions, and to each

of its officers, agents, representatives or employees who are engaged in the preparation and placement of advertisements.

VII

It is further ordered, That respondents shall, within sixty (60) days after service of this Order and annually thereafter for three (3) years, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

IN THE MATTER OF

HERMAN MILLER, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC.2(a) OF THE CLAYTON ACT

Docket C–1248. Consent Order, June 30, 1967—Modifying Order, June 9, 1983

This order reopens the proceeding and modifies the Commission's order issued on June 30, 1967 (71 F.T.C. 1579), so as to allow the company to specify the customers to which its dealers can serve.

ORDER MODIFYING CEASE AND DESIST ORDER ISSUED JUNE 30, 1967

By a petition dated January 11, 1983, and a supplement thereto dated February 18, 1983, respondent Herman Miller, Inc. ("Herman Miller") requests that the Commission reopen the proceeding in Docket No. C–1248 and delete subparagraphs 1., 2. and 3.(a) of the second unnumbered paragraph of the order issued by the Commission on June 30, 1967 [71 F.T.C. 1579]. Pursuant to Section 2.51 of the Commission's Rules of Practice, the petition was placed on the public record for comments. No comments were received.

Upon consideration of Herman Miller's request and supporting materials, and other relevant information, the Commission now finds that changed conditions of fact and law, and the public interest, warrant reopening and modification of the order.

Accordingly,

It is ordered, That this matter be, and it hereby is, reopened and that subparagraphs 1., 2. and 3.(a) of the second unnumbered paragraph of the Commission's order be, and they are hereby, deleted.

IN THE MATTER OF

CHICAGO METROPOLITAN PONTIAC DEALERS' ASSOCIATION, INC.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE TRUTH IN LENDING ACT

Docket C-3110. Complaint, June 9, 1983—Decision, June 9, 1983

This consent order requires a Wheaton, Ill. Pontiac dealers' association, among other things, to cease failing to make clear and conspicuous credit disclosures in T.V. advertisements promoting consumer credit. The order requires that credit terms be displayed in the video portion of the ad for at least five seconds, and that rates of finance charges be quoted as an "annual percentage rate." The association is also prohibited from using certain credit terms in advertisements promoting credit sales unless those advertisements also include statutorily required information in the manner prescribed by the Truth in Lending Act and its implementing Regulation Z.

Appearances

For the Commission: *George R. Bellack.*

For the respondent: *David G. Mountcastle,* Wheaton, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulations promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that the Chicago Metropolitan Pontiac Dealers' Association, Inc. (hereinafter referred to as "respondent"), a corporation, has violated the provisions of said Acts and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Chicago Metropolitan Pontiac Dealers' Association, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 208 North West Street, P.O. Box 48, Wheaton, Illinois.

PAR. 2. Respondent's members are now, and for some time have been, engaged in the business of offering for sale and sale of new and

used automobiles to the public at retail. In the ordinary course and conduct of their business, respondent's members regularly arrange for the extension of consumer credit, as "arrange for the extension of credit" and "consumer credit" are defined in Sections 226.2(h) and 226.2(p) of Regulation Z (12 C.F.R. 226), the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.[1]

PAR. 3. In the ordinary course and conduct of its business, respondent caused advertisements, as "advertisement" is defined in Section 226.2(d) of Regulation Z, to be broadcast on television at various times during January and February of 1981. Certain of these advertisements were designed to aid, promote, or assist directly or indirectly the extension of consumer credit by its members, as "consumer credit" is defined in Section 226.2(p) of Regulation Z.

PAR. 4. In certain of the advertisements referred to in Paragraph Three above, respondent used an advertising format in which the credit terms required by Section 226.10(d)(2) of Regulation Z were presented in the video portion of the advertisement. The required disclosures were displayed for an insufficient time for the viewer to read the credit terms, thereby detracting from the clarity and conspicuousness of the required disclosures.

PAR. 5. In certain of the advertisements referred to in Paragraph Three above, the annual percentage rate was not stated as "annual percentage rate," using that term, as required by Section 226.10(d)(1) of Regulation Z.

By means of such advertisements, respondent Chicago Metropolitan Pontiac Dealers' Association, Inc. violated Section 226.10(d)(2) of Regulation Z, which requires credit disclosures to be made clearly and conspicuously, and Section 226.10(d)(1) of Regulation Z which requires the finance charge to be stated as "annual percentage rate", using that term. Pursuant to Section 103(s) of the Truth in Lending Act, respondent's aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108(c) thereof, respondent has violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office

[1] All reference to the Truth in Lending Act and Regulation Z contained in this Complaint shall refer to the Truth in Lending Act as amended to March 23, 1976 and Regulation Z as amended to March 23, 1977.

proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Truth in Lending Act and the implementing regulations promulgated thereunder and of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Chicago Metropolitan Pontiac Dealers' Association, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 208 North West Street, P.O. Box 48, Wheaton, Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I. *It is ordered,* That respondent Chicago Metropolitan Pontiac Dealers' Association, Inc., its successors and assigns, member dealers, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any television advertisement to promote, directly or indirectly, any extension of consumer credit, as "advertisement" and "consumer credit" are defined in Regulation Z (12 C.F.R. 226), the implementing regulation of the Truth in Lending Act, 15 U.S.C. 1601

et seq.,[1] do forthwith cease and desist from:

1. Stating the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, unless the following terms are also stated, as required by Section 226.24 (c)(2) of Regulation Z:

(a) the amount or percentage of the downpayment;
(b) the terms of repayment; and
(c) the "annual percentage rate," using that term, and, if the rate may be increased after consummation, that fact.

The terms which are required by Section 226.24(c)(2) of Regulation Z are subject to the general "clear and conspicuous" standard set forth in Section 226.17(a)(1) of Regulation Z and Section 226.24–I of the Official Federal Reserve Board Staff Commentary on Regulation Z.

2. Failing to disclose the terms required by Section 226.24(c)(2) of Regulation Z in the video portion of any television advertisement subject to this order for at least five (5) seconds' duration.

3. Failing in an advertisement which states a rate of finance charge to state the rate as an "annual percentage rate," using that term as required by Section 226.24(b) of Regulation Z.

II. *It is further ordered,* That:

1. Respondent shall distribute a copy of this order to each person having decision-making authority to determine all or part of the contents of an advertisement which is subject to this order, and to the president or chief executive officer of each of respondent's members and shall secure from each such person a signed statement acknowledging receipt of said order.

2. Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

3. Respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order.

[1] All references to the Truth in Lending Act and Regulation Z contained in this Order shall refer to the Truth in Lending Act as amended to March 31, 1980, and Regulation Z as amended to April 1, 1981.

IN THE MATTER OF

THE COMPETITIVE EDGE, INC.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE TRUTH IN LENDING ACT

Docket C-3111. Complaint, June 9, 1983—Decision, June 9, 1983

This consent order requires an Albuquerque, N.M. advertising agency, among other things, to cease failing to make clear and conspicuous credit disclosures in T.V. advertisements promoting consumer credit. The order requires that credit terms be displayed in the video portion of the ad for at least five seconds, and that rates of finance charges be quoted as an "annual percentage rate." The agency is also prohibited from using certain credit terms in advertisements promoting credit sales unless those advertisements also include statutorily required information in the manner prescribed by the Truth In Lending Act and its implementing Regulation Z.

Appearances

For the Commission: *George R. Bellack.*

For the respondent: *Paull Mines, Poole, Tinnin & Martin,* Albuquerque, N.M. and *Christopher Smith, Arent, Fox, Kintner, Plotkin & Kahn,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulations promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that The Competitive Edge, Inc. (hereinafter sometimes referred to as "respondent"), a corporation, has violated the provisions of said Acts and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, The Competitive Edge, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Mexico, with its office and principal place of business located at Number 3 American Financial Center, 2400 Louisiana Boulevard, N.E., Albuquerque, New Mexico.

PAR. 2. Respondent is now, and for some time has been, engaged in the business of creating, producing, and causing dissemination of

advertisements for its clients, as "advertisement" is defined in Section 226.2(d) of Regulation Z (12 C.F.R. 226), the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.[1]

PAR. 3. In the ordinary course and conduct of its business as aforesaid, respondent created, produced and caused the dissemination of advertisements to be broadcast on television at various times during January and February 1981. Certain of these advertisements were designed to aid, promote, or assist directly or indirectly the extension of consumer credit, as "consumer credit" is defined in Section 226.2(p) of Regulation Z.

PAR. 4. In certain of the advertisements referred to in Paragraph Three above, respondent used an advertising format in which the credit terms required by Section 226.10(d)(2) of Regulation Z were presented in the video portion of the advertisement. The required disclosures were displayed for an insufficient time for the viewer to read the credit terms, thereby detracting from the clarity and conspicuousness of the required disclosures.

PAR. 5. In certain of the advertisements referred to in Paragraph Three above, the annual percentage rate was not stated as "annual percentage rate," using that term, as required by Section 226.10(d)(1) of Regulation Z.

By means of such advertisements, respondent, The Competitive Edge, Inc. violated Section 226.10(d)(2) of Regulation Z, which requires credit disclosures to be made clearly and conspicuously, and Section 226.10(d)(1) of Regulation Z which requires the finance charge to be stated as "annual percentage rate", using that term. Pursuant to Section 103(s) of the Truth in Lending Act, respondent's aforesaid failures to comply with Regulation Z constitute a violation of that Act and, pursuant to Section 108(c) thereof, respondent has thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Truth in Lending Act and the implementing regula-

[1] All reference to the Truth in Lending Act and Regulation Z contained in this Complaint shall refer to the Truth in Lending Act as amended to March 23, 1976 and Regulation Z as amended to March 23, 1977.

tions promulgated thereunder and of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent, The Competitive Edge, Inc., is a corporation Organized, existing and doing business under and by virtue of the laws of the State of New Mexico, with its office and principal place of business located at Number 3 American Financial Center, 2400 Louisiana Boulevard, N.E., in the City of Albuquerque, State of New Mexico.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I. *It is ordered,* That respondent The Competitive Edge, Inc., its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any television advertisement to promote, directly or indirectly, any extension of consumer credit, as "advertisement" and "consumer credit" are defined in Regulation Z (12 C.F.R. 226), the implementing regulation of the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*,[1] do forthwith cease and desist from:

[1] All references to the Truth in Lending Act and Regulation Z contained in this Order shall refer to the Truth in Lending Act as amended to March 31, 1980, and Regulation Z as amended to April 1, 1981.

1. Stating the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, unless the following terms are also stated, as required by Section 226.24 (c)(2) of Regulation Z:

(a) the amount or percentage of the downpayment;
(b) the terms of repayment; and
(c) the "annual percentage rate," using that term, and, if the rate may be increased after consummation, that fact.

The terms which are required by Section 226.24(c)(2) of Regulation Z are subject to the general "clear and conspicuous" standard set forth in Section 226.17(a)(1) of Regulation Z and Section 226.24–1 of the Official Federal Reserve Board Staff Commentary on Regulation Z.

2. Failing to disclose the terms required by Section 226.24(c)(2) of Regulation Z in the video portion of any television advertisement subject to this order for at least five (5) seconds' duration.

3. Failing in an advertisement which states a rate of finance charge to state the rate as an "annual percentage rate," using that term as required by Section 226.24(b) of Regulation Z.

II. *It is further ordered,* That:

1. Respondent shall distribute a copy of this order to the most senior person employed in each of its operating divisions and to each person having decision-making authority to determine all or part of the contents of an advertisement which is subject to this order, and shall secure from each such person a signed statement acknowledging receipt of said order.

2. Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

3. Respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

SCOTT PAPER COMPANY

VACATING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 6559. Modified Order, May 8, 1964—Vacating Order, June 22, 1983*

This order reopens the proceeding and vacates in its entirety the Commission's order issued on May 8, 1964 (65 F.T.C. 638). The Commission has determined that order provisions requiring prior Commission approval of future acquisitions generally should not have terms exceeding 10 years.

ORDER VACATING CEASE AND DESIST ORDER ISSUED ON MAY 8, 1964

By a petition filed on February 24, 1983, Scott Paper Company ("Scott") requests that the Commission reopen the proceeding in Docket No. 6559 and vacate the order issued by the Commission on May 8, 1964 [65 F.T.C. 638]. Pursuant to Section 2.51 of the Commission's Rules of Practice, the petition was placed on the public record for comments. No comments were received.

Upon consideration of Scott's petition and supporting materials, and other relevant information, the Commission finds that the public interest warrants reopening and vacating the order.

In *Columbian Rope Company,* Docket No. C–1794 [100 F.T.C. 531], the Commission determined that order provisions requiring prior Commission approval of future acquisitions generally should not have terms exceeding ten years. In most cases, the Commission believes that such prior approval provisions will have served their remedial and deterrent purposes after ten years and that the findings upon which such provisions are based should not be presumed to continue to exist for a longer period of time. The perpetual prior approval provision in this case has been outstanding for 18 years. No particular circumstances warrant an exception from this general policy. Therefore, the Commission, in the exercise of its discretion, finds that it is appropriate to vacate the order.

Accordingly, *it is ordered,* that this matter be, and it hereby is reopened and that the order in Docket No. 6559, issued by the Commission on May 8, 1964, be and it is hereby vacated.

* Original Commission Order issued Dec. 16, 1960 (57 F.T.C. 1415).

IN THE MATTER OF

BORG-WARNER CORPORATION, ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 8 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9120. Complaint, Nov. 7, 1978—Final Order, June 23, 1983

This order requires Borg-Warner, an automotive replacement parts manufacturer and its competitors, Bosch GmbH and Bosch U.S., among other things, to cease having interlocking directorates for a period of 10 years. The companies are also prohibited from having on their boards any person who is a board member of a competing company whose revenues derived from the relevant product or service market exceeds 5 million dollars; or any individual who fails to provide the statement required by the order. The order further prohibits Hans L. Merkle from serving as director of both Borg-Warner and any Bosch company that is a competitor of Borg-Warner and requires that the companies institute a monitoring program designed to detect unlawful interlocks.

Appearances

For the Commission: *Ann B. Malester, K. Keith Thurman* and *Sandra G. Wilkof.*

For the respondents: *James M. Johnstone, John B. Wyss* and *Tom W. Kirby, Kirkland & Ellis,* Washington, D.C. and *Charles Houchins,* in-house counsel, Chicago, Ill., for respondent Borg-Warner Corp. *Joseph A. McManus, Susan Rothschild* and *Allen Russell, Coudert Brothers,* New York City, for respondent Robert Bosch Corp. *Werner L. Polak, William M. Kelly* and *Thomas A. Dieterich, Shearman & Sterling,* New York City, for respondents Robert Bosch GmbH, Hans L. Merkle and Hans Bacher.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named Respondents have been, and are, in violation of the provisions of Section 8 of the Clayton Act, as amended, 15 U.S.C. 19, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, issues its complaint, stating its charges as follows:

1. Respondent Robert Bosch GmbH (hereinafter "Bosch GmbH") is a limited liability company organized under the laws of the Federal Republic of Germany and has its principal office at Robert-Bosch-Platz 1, D–7016 Gerlingen/Schillerhohe, Federal Republic of Germa-

ny. Bosch GmbH has capital, surplus, and undivided profits aggregating more than one million dollars. Bosch GmbH is engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is engaged in or its [2] business affects commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. Bosch GmbH conducts its business in part through subsidiaries or other operating entities. Bosch GmbH is the parent company of "the Bosch Group," which for purposes of this complaint includes the companies named in Paragraphs 2 through 4.

2. Robert Bosch North America, Incorporated (hereinafter "Bosch N.A.") is a Delaware corporation and has its principal office at 2800 25th Avenue, Broadview, Illinois. Bosch N.A. was organized in January, 1977, for the purpose of managing investments in various corporations. Bosch N.A. owns approximately 10 percent of the stock of Borg-Warner Corporation (hereinafter "B-W").

3. SIBA-Elektric GmbH (hereinafter "SIBA") is a limited liability company organized under the laws of the Federal Republic of Germany and has its principal office at Robert-Bosch-Platz 1, D–7016 Gerlingen/Schillerhohe, Federal Republic of Germany. SIBA is wholly-owned by Bosch GmbH. SIBA serves as a holding company with investments in various affiliates of the Bosch Group and holds the shares of Bosch N.A. in trust for Bosch GmbH as beneficial owner.

4. Respondent Robert Bosch Corporation (hereinafter "Bosch U.S.") is a New York corporation and has its principal office at 2800 25th Avenue, Broadview, Illinois. Bosch U.S. is wholly-owned, directly or indirectly, and wholly controlled by Bosch GmbH. Bosch U.S. has capital, surplus, and undivided profits aggregating more than one million dollars. Bosch U.S. is engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is engaged in or its business affects commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

5. Respondent B-W is a Delaware corporation and has its principal office at 200 South Michigan Avenue, Chicago, Illinois. B-W has capital, surplus, and undivided profits aggregating more than one million dollars. B-W is engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is engaged in or its business affects commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. [3]

6. Respondent Hans L. Merkle is an individual and resident of the Federal Republic of Germany whose address is Reuerbacher Heide 58, D–7000 Stuttgart 1, Federal Republic of Germany. Dr. Merkle is

chairman of the board of management of Bosch GmbH and a member of the boards of directors of both Bosch U.S. and B-W.

7. Respondent Hans Bacher is an individual and resident of the Federal Republic of Germany whose address is Stuttgarter Strasse 122, D–7250 Leonberg, Federal Republic of Germany. Dr. Bacher is a member of the board of management of Bosch GmbH and a member of the boards of directors of both Bosch U.S. and B-W.

8. On January 11, 1977, Bosch GmbH and B-W signed an agreement whereby Bosch GmbH or its designee would purchase approximately ten (10) percent of the stock of B-W. B-W agreed that its management would recommend to its board of directors that two representatives designated by Bosch GmbH and acceptable to the management of B-W be included in the next proxy statement as nominees for the board of directors of B-W. B-W and Bosch GmbH further agreed that they intend for Bosch GmbH to have two of its designated representatives serving on the board of directors as long as Bosch GmbH or its designee owns nine percent or more of the stock of B-W and one designated representative if Bosch GmbH should own more than five percent and less than nine percent of the stock of B-W.

9. On February 10, 1977, Bosch GmbH wrote B-W that it had designated Hans L. Merkle and Hans Bacher to serve on B-W's board of directors. On February 16, 1977, Bosch N.A. purchased two million shares of B-W, which constitutes approximately ten percent of B-W's stock, for $62,900,000. On or about April 26, 1977, pursuant to the agreement between Bosch GmbH and B-W, Dr. Merkle and Dr. Bacher became directors of B-W.

10. The businesses of both Bosch GmbH and Bosch U.S. include the sale in or affecting commerce of, among other products, automotive ignition parts, wire and cable, carburetors, carburetor kits, automotive test equipment, automotive air conditioner compressors, hydraulic valves and hydraulic gear pumps and motors. [4]

11. The business of B-W includes the sale in or affecting commerce of, among other products, automotive ignition parts, wire and cable, carburetors, carburetor kits, automotive test equipment, automotive air conditioner compressors, hydraulic valves and hydraulic gear pumps and motors.

12. Bosch GmbH and B-W, by the nature of their automotive parts business, including ignition parts, wire and cable, carburetors, carburetor kits, automotive test equipment, automotive air conditioner compressors, and certain non-automotive business such as hydraulic valves, hydraulic gear pumps and motors and the location of their operations with respect to said products, are competitors of each other.

13. (a) The elimination of competition by agreement between Bosch

GmbH and B-W would constitute a violation of the provisions of the antitrust laws of the United States.

(b) The elimination of competition by agreement between Bosch U.S. and B-W would constitute a violation of the provisions of the antitrust laws of the United States.

14. (a) Dr. Merkle's simultaneous membership on the board of management of Bosch GmbH and the board of directors of B-W constitute violations of Section 8 of the Clayton Act, as amended, 15 U.S.C. 19, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, on the part of Bosch GmbH, B-W and Dr. Merkle.

(b) Dr. Merkle's simultaneous membership on the board of directors of Bosch U.S. and of B-W constitutes violations of Section 8 of the Clayton Act, as amended, 15 U.S.C. 19, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, on the part of Bosch GmbH, Bosch U.S., B-W and Dr. Merkle.

15. (a) Dr. Bacher's simultaneous membership on the board of management of Bosch GmbH and the board of directors of B-W constitute violations of Section 8 of the Clayton Act, as amended, 15 U.S.C. 19, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, on the part of Bosch GmbH, B-W and Dr. Bacher. [5]

(b) Dr. Bacher's simultaneous membership on the board of directors of Bosch U.S. and of B-W constitutes violations of Section 8 of the Clayton Act, as amended, 15 U.S.C. 19, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, on the part of Bosch GmbH, Bosch U.S., B-W and Dr. Bacher.

Initial Decision by

Theodor P. von Brand, Administrative Law Judge

June 30, 1980

Preliminary Statement

The complaint charges that Borg-Warner Corporation (Borg-Warner), Robert Bosch GmbH (Bosch GmbH), Robert Bosch Corporation (Bosch U.S.) and two individuals Hans L. Merkle (Merkle) and Hans Bacher (Bacher) violated Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

The complaint alleges that Bosch GmbH and Borg-Warner compete in the sale of automotive ignition parts, wire and cable, carburetors, carburetor kits, automotive test equipment, automotive air conditioning compressors, and in non-automotive products such as hydraulic

valves, hydraulic gear pumps and motors.[1]

Two violations are alleged. The first is Dr. Merkle's and Dr. Bacher's membership on the board of management of Bosch GmbH and on Borg-Warner's board of directors. The second violation charged is their simultaneous membership on the board of directors of Borg-Warner and that of Bosch U.S., a subsidiary of Bosch GmbH.

Respondents deny that either statute has been violated on the ground that complaint counsel have failed to establish the elements of a Section 8 violation. Specifically, they contend the record fails to demonstrate competition between Borg-Warner on the one hand and on the other Bosch GmbH and/or the latter's subsidiaries. Respondents urge that even if some competition is proven the competitive overlap is de minimis and not substantial as required by Section 8. Respondents further argue that charges of illegal interlocks based on the individual [3] respondents' positions with Bosch GmbH or on the United States activities of Femsa Inc. must be dismissed since Section 8 applies only to direct competition and not to indirect competition involving a parent or subsidiary of one of the interlocking corporations.

Bosch GmbH, a foreign corporation, contends further that the charges against it cannot be sustained since it is not directly engaged in commerce within the meaning of Section 8 of the Clayton Act. Bosch GmbH contends that the activities of its United States subsidiary are irrelevant to the resolution of that issue.

This matter is now before the undersigned for decision based on the allegations of the complaint, the answer, the evidence of record and the proposed findings of fact, conclusions and briefs filed by the parties. All proposed findings of fact, conclusions and arguments not specifically found or accepted herein are rejected. The undersigned, having considered the entire record and the contentions of the parties, makes the following findings of fact and conclusions, and issues the orders set out herein.

FINDINGS OF FACT

I. THE RESPONDENTS

A. *Borg-Warner Corporation*

1. Respondent Borg-Warner Corporation (Borg-Warner) is a Delaware corporation with its principal office at 200 South Michigan Avenue, Chicago, Illinois (Comp. and Borg-Warner's Ans. ¶ 5).

[1] Complaint counsel in the pretrial determined to offer no evidence concerning automotive test equipment and carburetors.

2. Borg-Warner has capital, surplus, and undivided profits aggregating more than $1 million (Comp. and Borg-Warner's Ans. ¶ 5).

3. In 1976, Borg-Warner had worldwide sales of over $1.86 billion (CX 21A). In 1979, its total sales amounted to approximately $3 billion (Trauscht 1063–64).

4. Borg-Warner is a decentralized company, operating through five separate groups, each with various divisions in the following areas, air conditioning, chemicals and plastics, financial services, industrial products and transportation equipment (Trauscht 1063).

5. The automotive parts division and the hydraulics division, which was sold in 1979, belonged to Borg-Warner's transportation equipment group (Trauscht 1067–68; Reichers 621; [4] CX 22). Borg-Warner's York Automotive Division sells automotive air conditioner compressors in the United States (Borg-Warner Ans. ¶ 11; CX 21C).

6. Borg-Warner's business includes the sale of automotive ignition parts, wire and cable parts, carburetor kits, and automotive air conditioning compressors. Until mid-1979, Borg-Warner offered for sale and sold hydraulic valves and hydraulic gear pumps and motors (Comp. and Borg-Warner's Ans. ¶ 11; CX 3A-Z–37, 4A-Z–248, 5A-Z–6, 15A-Z–80, 16A-Z–43; App. B to Int. at 1, 13 *in camera*).

7. Borg-Warner is engaged in commerce as "commerce" is defined in the Clayton Act and is engaged in or its business affects commerce as "commerce" is defined in the Federal Trade Commission Act (Comp. and Borg-Warner Ans. ¶ 5).

B. *Robert Bosch GmbH*

8. Respondent Robert Bosch GmbH (Bosch GmbH) is a limited liability company organized under the laws of the Federal Republic of Germany with its principal office at Robert Bosch Platz 1, D–7016 Gerlingen/Schillerhohe, Federal Republic of Germany (Comp. and Bosch GmbH Ans. ¶ 1).

9. Bosch GmbH is a diversified producer of electric, electronic and mechanical components, systems and products for automotive, consumer and industrial markets including hydraulic equipment (CX 33).

10. Bosch GmbH is engaged in commerce as "commerce" is defined in the Clayton Act and in commerce or affecting commerce as "commerce" is defined in the Federal Trade Commission Act by virtue of the business operations of its subsidiary Bosch U.S. (Findings 33–61).

C. *Robert Bosch Corporation*

11. Respondent Robert Bosch Corporation (Bosch U.S.) is a New York corporation with its principal office at 2800 25th Avenue, Broadview, Illinois (Comp. and Bosch U.S. Ans. ¶ 4; CX 60).

12. Bosch U.S. has capital, surplus and undivided profits aggregating more than $1 million (Comp. and Bosch U.S. Ans. ¶ 4; CX 60).

13. Since its organization in 1953, the capital stock of Bosch U.S. has been owned, directly and indirectly through subsidiaries by Bosch GmbH (Comp. and Bosch U.S. Ans. ¶ 4; Fiene 1323, 1329; Finding 35). [5]

14. The business of Bosch U.S. has included, among other products, the sale of automotive ignition parts, cable sets, and carburetor kits, for imported vehicles and motors only, various hydraulic products including accumulators and piston pumps as well as hydraulic valves, gear pumps and motors (Comp. and Bosch U.S. Ans. ¶ 10; CX 17, 18; Bendixen 897–902; Weisse 1487, 1490, 1502).

15. The bulk of the business of Bosch U.S. is automotive related (Fiene 1336). It also supplies service tools for dealers and independent warehouses for testing purposes, power tools geared to the construction industry, kitchen appliances, hearing aids, packaging machinery, hydraulics, and television studio equipment (Fiene 1336).

16. Bosch U.S. is engaged in commerce as "commerce" is defined in the Clayton Act and is engaged in or its business affects commerce, as "commerce" is defined in the Federal Trade Commission Act (Comp. and Bosch U.S. Ans. ¶ 4).

D. *The Individual Respondents*

17. Respondent Hans. L. Merkle (Merkle) is an individual and resident of the Federal Republic of Germany whose address is Reuerbacher Heide 58, D–7000 Stuttgart 1, Federal Republic of Germany (Comp. and Merkle's Ans. ¶ 6).

18. Dr. Merkle is currently Chairman of the board of management of Bosch GmbH and has been a member of that board since 1958 (Comp. and Merkle's Ans. ¶ 6; Bosch GmbH Int. No. 10).

19. Since 1967 and at all times relevant herein, Dr. Merkle has been a member of the board of directors of Bosch U.S. (Comp. and Merkle's Ans. ¶ 6; CX 59L).

20. On or about April 26, 1977, Dr. Merkle became a member of the board of directors of Borg-Warner (CX 67A-B).

21. Beginning in 1977 and at all times relevant herein, Dr. Merkle served simultaneously on the board of management of Bosch GmbH, the board of directors of Bosch U.S., and the board of directors of Borg-Warner.

22. Respondent Hans Bacher (Bacher) is an individual and resident of the Federal Republic of Germany whose address is Stuttgarter Strasse 122, D–7250 Leonberg, Federal Republic of Germany (Comp. and Bacher's Ans. ¶ 7).

23. Dr. Bacher is currently a member of the board of management

of Bosch and has been a member of that board since 1967 (Comp. and Bacher's Ans. ¶ 7; Bosch GmbH Int. No. 10 at 15). [6]

24. At all times relevant herein, Dr. Bacher was a member of the board of directors of Bosch U.S. (Comp. and Bacher's Ans. ¶ 7).

25. On or about April 26, 1977, Dr. Bacher became a member of the board of directors of Borg-Warner (CX 67A-B).

26. Beginning in April 1977 and at all times relevant herein, Dr. Bacher served simultaneously on the board of management of Bosch GmbH, the board of directors of Bosch U.S. and the board of directors of Borg-Warner.

II. THE STOCK PURCHASE BY BOSCH GmbH OF BORG-WARNER'S STOCK AND THE RELATED AGREEMENT FOR REPRESENTATION OF BOSCH GmbH ON BORG-WARNER'S BOARD OF DIRECTORS

27. On January 11, 1977, Bosch GmbH and Borg-Warner agreed that Bosch or its designee would purchase 2,000,000 shares of Borg-Warner stock representing about 9.5 percent of Borg-Warner's stock for a consideration of $62,900,000 (Comp. and Borg-Warner's Ans. ¶ 8 and 9; CX 59D-E).

28. The two million shares were issued in the name of Robert Bosch North America Incorporated, a Delaware corporation organized in January 1977 which was wholly owned by SIBA-Elektric GmbH, which in turn was wholly owned by Bosch GmbH, which supplied the purchase price for such stock (CX 59; Bosch GmbH Int. No. 12).

29. Borg-Warner agreed that its management would recommend to its board of directors that two representatives designated by Bosch GmbH and acceptable to the management of Borg-Warner be included, in the next proxy statement issued by Borg-Warner, as nominees for election to the board of directors of Borg-Warner (CX 59E, 61A).

30. Borg-Warner and Bosch GmbH further agreed that Bosch GmbH would have two designated representatives serving on Borg-Warner's board of directors as long as Bosch GmbH or its designee owned 9 percent or more of Borg-Warner's stock and one designated representative if Bosch GmbH or its designee owned more than 5 percent but less than 9 percent of Borg-Warner's stock (CX 59F).

31. On February 10, 1977, Bosch GmbH informed Borg-Warner that it had designated Dr. Merkle and Dr. Bacher to serve on Borg-Warner's board of directors (Comp. and Bosch GmbH's Ans. ¶ 9; CX 67A-B). Dr. Merkle and Dr. Bacher were pursuant to such designation elected to Borg-Warner's board of directors and still hold these positions. [7]

32. At the time that Bosch GmbH took an equity position in Borg-Warner, study teams were formed to investigate the opportunities for technical cooperation between the two companies (Weltyk 1281).

III. THE RELATIONSHIP OF BOSCH GmbH AND BOSCH U.S.

33. Bosch GmbH holds itself out as "the parent company of the Bosch Group" (SEC Report filed by Robert Bosch North America Inc., Feb. 23, 1977; CX 59B-C).

34. Bosch GmbH formed Bosch U.S. in 1953 to provide service training and product availability for Bosch GmbH's import customers in the United States (CX 88 at 25).

35. Bosch GmbH and two of its subsidiaries Robert Bosch Internationale and Robert Bosch North America Inc. own the stock of Bosch U.S. (Fiene 1329).[2] Bosch GmbH owns more than 50 percent of the stock of Robert Bosch Internationale and Robert Bosch North America (Fiene 1329). The only function of these two subsidiaries is to act as a holding company (Fiene 1329).

36. The board of directors of Bosch U.S. is elected by the shareholders of that corporation (Bosch GmbH and its subsidiaries in which it holds a controlling interest). Bosch GmbH participates in the selection of the Bosch U.S. board of directors by nominating prospective or current members and by voting the shares it holds in Bosch U.S. (Bosch GmbH Int. No. 9).

37. Bosch U.S. has twelve members on its board of directors, four of them are officers and directors of Bosch GmbH (Fiene 1325–26).

38. Allen H. Russell, a Director and Secretary of Robert Bosch North America, Inc. is also Chairman of the Board of Bosch U.S. (CX 59J, 88 p. 18).

39. Earl R. Fiene, president, chief executive and a board member of Bosch U.S. is also President of Robert Bosch North America (Bosch GmbH Int. No. 18; CX 88 p. 7).

40. Mr. Fiene, the current President of Bosch U.S. in 1973 was employed as a consultant by Bosch GmbH for North American activities to evaluate business opportunities, to involve himself with licensee operations, potential new business [8] ventures, "and also to collaborate with the existing corporation, Robert Bosch Corporation [Bosch U.S.]" (CX 88 p. 6). Mr. Fiene became employed by and assumed his positions as President, chief executive officer and board member with Bosch U.S. in 1974 (Fiene 1320–21).

41. Approximately 100 of Bosch U.S.'s current 1,500 employees are former employees of Bosch GmbH. Such employment is based on "some technical and specialty skills which unfortunately are not available in the local market in many cases" (Fiene 1325).

42. Frederick W. Hohage is a corporate officer of Bosch U.S. (Bosch U.S. Int. No. 8 at 11). He has held the following positions with Bosch

[2] Robert Bosch Internationale holds 51 percent of the stock; Bosch GmbH 42 percent; and Robert Bosch North America 7 percent (Bosch GmbH Int. No. 4).

GmbH and its affiliates in the periods indicated:[3]

	Date
International Sales Promotion Manager	1964
National Sales Manager, Robert Bosch France	1965
Export Manager	1966-68
Delegate to form joint venture	1969
Marketing Staff	1970
Sales Director, Northern Germany	1971
General Manager and Board Member, Robert Bosch Italy	1972-75
President, Chief Executive Officer and Chairman, Robert Bosch (Canada) Ltd.	1979

(Bosch GmbH Supp. Int. No. 8 p. 4–5) [9]

43. Rolf Leeven is a Vice President of Bosch U.S. (Bosch U.S. Int. No. 8 p. 11). He held the following positions with Bosch GmbH in the periods indicated:

Assistant to Division Director of Finance and Administration	1965-67
Plant Controller, Diesel Manufacturing Plant	1967
Director of Finance and Administration	1967-71
Consulting Director, Corporate Planning and Control	1971-75

(Bosch GmbH Supp. Int. No. 8 p. 5)

44. Guenther Weisse is a Vice President of Bosch U.S. (Bosch Int. No. 8 p. 11). He held the following positions with Bosch GmbH in the periods indicated:

Engineering employee	1963-67
Commercial employee	1967-68
Manager of Business Planning and Market Development	1968-71

(Bosch GmbH Supp. Int. No. 8 p. 4)

45. Kurt Boehmler is a Vice President of Bosch U.S. (Bosch U.S. Int.

[3] All positions were with Bosch GmbH unless otherwise indicated.

No. 8 p. 11). He held the following positions with Bosch GmbH in the periods indicated:

Planning Engineer	1960-64
Manager, Manufacturing Engineering	1964-69
Technical Works Manager, Motor Industries Co. Ltd.	1969-73
Manager of Engineering	1973-77
Manager, Production and Development	1977-78

(Bosch GmbH Supp. Int. No. 8 p. 5) [10]

Five of the fifteen employees of Robert Bosch North America, a subsidiary holding company of Bosch GmbH and a stockholder in Bosch U.S., are simultaneously employed by Bosch U.S. (CX 88 p. 18–19); the office space of Robert Bosch North America is a "Contiguous part of the overall Robert Bosch Corporation [Bosch U.S.] real estate" (CX 88 p. 19).

46. Bosch U.S. submits financial reports, forecasts, operating results, balance sheets, and business plans to Bosch GmbH (Fiene 1330; Bosch GmbH Int. No. 31 p. 48). The assets and financial results of Bosch U.S. are not reflected on the balance sheet of Bosch GmbH (Bosch GmbH Int. No. 31 p. 48).

47. The total annual dollar volume of sales by Bosch U.S. of products manufactured by Bosch GmbH and the percentage of such sales of Bosch U.S.'s total annual volume of sales was the following:

SALES BY BOSCH U.S. OF BOSCH GMBH PRODUCTS	PERCENTAGE OF TOTAL BOSCH U.S. SALES
1976 – $57,551,000	52%
1977 – 79,637,000	54%
1978 – 86,270,000	50%

(Bosch U.S. Int. No. 31(h) p. 28)

48. Bosch U.S. management has business discussions with Bosch GmbH concerning what products should be introduced in its market (Fiene 1331). On occasion, Bosch U.S. has told Bosch GmbH that the former could not market a product which the parent company had suggested for introduction in the United States (Fiene 1331).

49. Bosch U.S. has negotiated the prices at which it purchased products from Bosch GmbH (Fiene 1333).

50. In the automotive parts area, Bosch U.S. is the largest offshore customer of Bosch GmbH (Fiene 1338).

51. Bosch U.S. has taken on new lines of business not engaged in by Bosch GmbH (Fiene 1331–32). It has also purchased products from sources other than Bosch GmbH for the United States automotive

parts aftermarket in the ignition line. It has made such purchases from other suppliers in the hydraulics area (Fiene 1332).

52. Bosch U.S. is also engaged in the manufacture of electronic control units, starters, alternators and generators [11] (Fiene 1333–34). Prior thereto Bosch U.S. had imported these products from Germany (Fiene 1334).

53. Bosch GmbH has made capital contributions to the business of Bosch U.S. to pay for facilities and machine tools in order to start new programs. Otherwise Bosch U.S., which has a line of credit, obtains capital from domestic sources (Fiene 1335).

54. Bosch GmbH has communicated with Bosch U.S. concerning large capital major proposed expenditures by Bosch U.S. (Bosch GmbH and Bosch U.S. RA 54, 55).

55. Bosch U.S., which is the only firm in the United States licensed to use the trademarks of Bosch GmbH (Bosch GmbH RA 29; Bosch U.S. RA 29), pays royalties to Bosch GmbH for use of the trademarks owned by the latter (Bosch GmbH Int. No. 31j).

56. In hydraulics sales to Massey Ferguson, Bosch U.S. and Bosch GmbH collaborate on engineering and specification requirements as well as on the applications. Such collaboration "is tied into, again, [the] Bosch relationship worldwide with Massey Ferguson, trying to achieve uniform application and interchangeability, such as Brazil and Europe" (CX 88 pp. 35–36).

57. A Borg-Warner official, William H. Weltyk, Vice President of Engineering, reported in pertinent part concerning a visit to Bosch GmbH in Stuttgart, Germany in Feb. 3–6, 1976:

We then met with Mr. Hertz who is in charge of the aftermarket outside of Europe. We talked in particular about Bosch's aftermarket activities in the United States which is headquartered in Chicago. Their aftermarket group employs about 800 people and they have offices in New York, San Francisco and Houston. They have direct sales to 4 classes of trade: to warehouse distributors, to foreign vehicle distributors, to mass merchandisers and to outlets which specialize in diesel engines. In total, Bosch has about 1,000 direct accounts. Their primary products are spark plugs, starters, alternators (which are mainly rebuilt), ignition parts and electronic fuel injection equipment. *All in all, the Bosch organization seems to have a very adequate aftermarket group in the United States.* Mr. Hertz was not available for a very long time and therefore *we did not have ample opportunity to probe what opportunities for cooperation might exist in this area.* Also we were not able to cover distribution in South America [12] or Mexico as a result of his tight schedule. *These topics will be reviewed further in future meetings* (CX 29I; emphasis added).

58. The memorandum makes it clear that Bosch U.S.'s activities in the United States automotive aftermarket were subject to a Bosch GmbH official "in charge of the aftermarket outside of Europe" and that Bosch U.S.'s activities were considered to be a part of the Bosch

organization as a whole[4] (Finding 57).

59. The only company located in the United States to which Bosch GmbH sells automotive products is Bosch U.S. (CX 88 p. 33–34). In the United States, Bosch U.S. performs warranty service for Bosch automotive equipment in case of failure. It has "total product responsibility in this market, for application, training, service, warranty" (CX 88 at 33). Bosch GmbH handles after sales service matters in close cooperation with those responsible for such functions in locations outside Germany. In this connection, Bosch GmbH, which provides a world wide "Service Network" (CX 64S), represents:

> Robert Bosch GmbH is divided into various divisions. One of these, the Automotive Equipment Division, is itself further subdivided into a number of Product Divisions and an Aftermarket Division. Inside this division (KH), everything concerning aftersales service for the Automotive Equipment Division is handled by KH/VKD, the Head Department for the Bosch Service Organization, in close cooperation with the Product Divisions, the Technical Sales Divisions in inland, and our National Representatives in other countries (CX 64Y).

60. On March 10, 1976, K.C. Berger of Bosch GmbH wrote to Charles W. Shiver president of the Borg-Warner hydraulics division that he looked forward to another meeting "to formulate a joint action plan for the U.S. and overseas" (CX 37A–B). The suggestion by a Bosch GmbH official that Bosch GmbH and Borg-Warner officials meet to formulate a joint action plan concerning the marketing of or technical cooperation with respect to hydraulics in the U.S. as well as overseas compels [13] the inference that Bosch GmbH could exercise control over Bosch U.S.'s marketing decisions.

61. Bosch GmbH, although it does not control Bosch U.S.'s day-to-day marketing and operating decisions, has the power to control the major business decisions of this subsidiary, which was set up to market Bosch's products in the United States and whose activities have been coordinated in important respects with the worldwide operations of the Bosch group (Findings 33–60).

IV. AUTOMOTIVE REPLACEMENT PARTS

A. *The Automotive Parts Aftermarket*

62. Distribution in the wholesale automotive parts aftermarket takes place at three levels. Suppliers of parts such as Bosch U.S. and Borg-Warner assemble and distribute lines of automotive parts which they resell to warehouse distributors (WDs). The WDs, who are authorized by the supplier to resell one or more lines, are intermediate wholesalers. The function of the WD is to maintain local inventories

[4] The exhibit in question consists of Mr. Weltyk's notes of that meeting. He testified on Dec. 19, 1979 (Weltyk 1308).

of their product lines and to resell those lines to jobbers. In return for that service, suppliers grant WDs a functional discount from the jobber price. Jobbers serve as wholesale suppliers to retail outlets, such as repair shops or service stations. Some jobbers also make over-the-counter retail sales (Nelson 496; Weber 802–03; Bendixen 913).

63. A line of automotive parts are the parts necessary to supply and complete the function of a specific phase of operations within a vehicle, for example, ignition parts (Reichers 622).

64. A full line of auto parts is a line which has all parts in the relevant functional category necessary to repair the great majority of cars estimated to be in service in a given area (Weber 861; *see also* Wagner 1223–24).

65. A short line is a series of products within a specified category such as ignition parts which is comprised only of high turnover or fast moving items (Weber 861).

66. In many instances, a manufacturer can successfully compete against a firm offering a broader line by offering a line comprised of the fast moving items (Nelson 608–09).

67. There is no single manufacturer of or supplier of auto parts that offers every single part with application on all domestically-produced vehicles or every part with application on all foreign made vehicles (Nelson 498–99). [14]

68. Catalogs of auto parts suppliers (including those of Borg-Warner and Bosch U.S.) are distributed to WDs who in turn distribute them to their customers. Such catalogs are used to make purchasing and installation decisions (Nelson 491).

69. The coverage of the automotive parts lines of different manufacturers can be compared by examining the manufacturers' interchange lists (Weber 772, 860).

70. When a WD substitutes one line for another, this is known as a "change over" of a line. During a change over, the displaced supplier's parts are reboxed and renumbered so that they can be sold from the incoming supplier's catalog. Such change overs occur between substitutable lines (Reichers 633–34, 646; Johnson 979–82).

71. The record does not evidence change overs between the Bosch and Borg-Warner auto parts lines (Reichers 646–47, 649–50).

72. Traditional WDs are domestic distributors who sell their parts through jobbers (Wagner 1258–59). A traditional full-line WD carries a multiplicity of parts to service the major portion of all phases of vehicle operation (Reichers (625–26). Traditional full-line WDs do not attempt to provide complete service for import cars (Reichers 626).

73. The AWDA is the Automotive Warehouse Distributors Association. It is comprised of domestic WDs throughout the United States as well as automotive parts manufacturers (Wagner 1258–59; CX 85). Import specialist WDs are not members of that organization (Wagner

1259). For manufacturer members the annual AWDA meeting "is also a means to obtain new warehouse distributors" (Wagner 1259).

74. Individuals who repair or own foreign cars prefer parts made overseas (Wildermuth 1396).

75. There are distributors who specialize in parts for import cars (Reichers 628; Steiner 1368–69). Geon, Lucas, Beck/Arnley, World Parts, and Repco are such distributors (Reichers 629). Specialized WDs handling foreign car parts generally sell their products to import jobbers (Wagner 1232).

76. WDs do not necessarily stock a full line of automotive parts. If it is the fast moving items within a line which sell, those are the items which will be stocked by certain WDs (Wildermuth 1409).[5] [15]

77. Most WDs don't duplicate lines because it increases inventory, reduces turnover, and affects their return on investment (Reichers 705). One WD carries the Borg-Warner and Bosch lines of ignition parts and needs both in its business, considering them complementary (Wildermuth 1406–07).

78. Domestic WDs who sell Bosch products for foreign car applications sell through traditional channels by selling through independent jobbers (Wagner 1234).

79. There are jobbers specializing in selling parts for domestic car applications and jobbers who specialize in selling parts for foreign car applications (Wildermuth 1396; Wagner 1232).

80. Some foreign car jobbers carry only foreign car parts, but other jobbers in that category carry both domestic and foreign car parts (Wildermuth 1396–97). Jobbers involved in foreign car part sales have a tendency to buy from Bosch because of a preference for original equipment parts (Wildermuth 1405).

81. In the case of domestic jobbers, it is not unusual for jobbers to carry parts for domestic cars and parts for the more popular foreign imports (Weber 846–47). Some jobbers sell full lines of both domestic and imported parts (Wagner 1237). Certain WDs sell to both domestic and foreign car jobbers (Wildermuth 1396).

82. There are approximately 15 million foreign cars from 35–40 manufacturers on the road in the United States today (Wagner 1224–25). VWs constitute four million of this total (Wagner 1251). The three leading sellers of foreign cars based on registration are Toyota, Datsun, and Volkswagen (Wagner 1269).

B. *Borg-Warner*

83. The Borg-Warner Automotive Parts Division, functions as the marketing arm for other Borg-Warner divisions involved in manufac-

[5] As one WD witness stated "We don't stock a full line of anything . . . we stock what we sell" (Wildermuth 1409).

turing parts and components for original equipment manufacturers.[6]

84. In 1978, the Borg-Warner Automotive Parts Division had approximate sales of $69.1 million accounting for approximately [16] 3 percent of total Borg-Warner sales (BWX 34A, *in camera*). It sells only in the aftermarket (Reichers 621).

85. Borg-Warner sells replacement parts for domestic and imported cars, offering a short line for foreign applications (Weber 861).

86. Because of popular demand from its WDs, Borg-Warner around 1972 and 1973 began adding applications for fast-moving popular import cars (Reichers 639).

87. The Borg-Warner Automotive Parts Division sells to traditional full-line WDs (Reichers 625). It is a member of AWDA (CX 85; Finding 73). There are approximately 1,000 full-line WDs in the United States, and about 700 of these are served by the Borg-Warner auto parts division (Reichers 638). Borg-Warner does not attempt to sell to companies specializing in parts for imported cars (Reichers 629).

88. The Borg-Warner Auto Parts Division does not sell individual parts to WDs (Reichers 637). Borg-Warner will sell a single product line to a customer, as for example the ignition line (Johnson 1003). While Borg-Warner normally sells every application in a line to a customer, the customer does not necessarily have to buy every application within a line such as slow moving items (Johnson 1003). The typical Borg-Warner WD does not have more than one supplier for a given line (Reichers 634).

C. *Bosch U.S.-Bosch GmbH*

89. Bosch U.S. has an ASM Division which is engaged in automotive sales to manufacturers in the aftermarket (Bendixen 894) and the ASD division which is engaged in automotive sales to independent distributors (Bendixen 895). In addition, there is the Automotive Marketing Department of Bosch U.S. which is engaged in product management, cataloguing, advertising and sales promotion (Bendixen 896).

90. The total dollar amount of Bosch U.S. sales in 1978 to WDs was approximately $36 million (Bendixen 914). Of this total 30 percent of the sales are to common or domestic WDs and 70 percent is comprised of sales to import WDs (Bendixen 914).

91. Ignition parts, wire and cable kits and carburetor kits accounted for 15 percent of Bosch U.S.'s automotive aftermarket sales in 1978 (Bendixen 917).

92. Bosch offers a full-line of automotive parts for foreign car applications (Weber 861–62).

93. Bosch U.S.'s primary source of auto parts is Germany; it also

[6] The automotive parts division reports to the president of the transportation equipment group which is one of five Borg-Warner groups representing 13 divisions primarily involved in transportation equipment (Reichers 622).

obtains parts from Bosch's factory in Brazil, and in the [17] case of its expanding ignition line for Japanese parts these come directly from Japan (Bendixen 900).

94. The advertising of Bosch U.S. represents that its parts are original equipment on many foreign cars (RBUSX 4).

95. Bosch U.S. has published certain advertisements in publications whose circulation includes WDs who distribute parts for domestically produced cars (Bendixen 931–32). Such advertisements "are directed to the total automotive aftermarket, and there is nothing special for the import. They all read the same magazines and the magazines are read by import distributors, by warehouse distributors, common warehouse distributors, jobbers and some consumers" (Bendixen 932–33).

96. Bosch U.S. sells to two types of WDs, import specialists, and domestic or traditional WDs (Wagner 1213, 1266–67; Bendixen 914). Bosch U.S. is a member of AWDA (Wagner 1258–59; Finding 73).

97. There are approximately 540 WDs who sell Bosch products (Bendixen 912). Approximately 30 percent of these WDs are import specialists (Bendixen 913). The other 70 percent of the WDs selling Bosch products are domestic WDs selling parts for domestic and import cars (Bendixen 913–14).

98. In 1978, the total dollar amount of Bosch U.S.'s sales to WDs was about $36 million (Bendixen 914). Bosch U.S. sales to special import parts WDs accounted for 70 percent of its total dollar volume (Bendixen 914). Its sales to domestic WDs were on the order of $10 million in that year.[7]

D. *Ignition Parts*

1. The Product

99. Ignition parts are generally considered to be a separate line in the automotive parts aftermarket (Weber 778). The term ignition parts, as commonly understood in the industry, means the distributor and the service components which are the points, condensors, caps, rotors, and vacuums (Bendixen 897). Alternators, generators, and starters are considered electrical parts (Bendixen 898; CX 88 p. 32).

100. The relevant geographic market for the purpose of determining whether competition in the sale of ignition and [18] other relevant auto parts exists between Bosch U.S. and Borg-Warner and Bosch GmbH and Borg-Warner is the United States (Comp. Counsel Int. p. 4).

[7] Thirty percent of $36 million.

2. Borg-Warner

101. The Borg-Warner ignition parts line consists of contact point sets, condensors, voltage regulators, coils, caps, rotors and switches (Reichers 639; Johnson 987).

102. Borg-Warner attempts to carry as wide a coverage as possible or at least 90 percent of the aftermarket for domestic cars (Reichers 639). The Borg-Warner ignition parts line also includes parts for import car applications (Reichers 639). Borg-Warner carries a short line of ignition parts for foreign applications (Weber 861).

103. The Borg-Warner ignition line includes import car applications "because of popular demand" (Reichers 640).

104. In 1978, the approximate sales of Borg-Warner's ignition line by the Automotive Parts Division were $12.1 million. Of that total less than 5 percent ($600,000) were sales for import car applications (BWX 34A *in camera;* Reichers 640–41).

105. WDs advertise that they offer Borg-Warner ignition parts for application on domestic and import cars (CX 96H).

106. Borg-Warner considered Standard Motor Products, Niehoff, Guaranteed, and Filko to be its competitors in the ignition parts line among the major independent manufacturers (Reichers 645). Its other major competitors were original equipment manufacturers such as General Motors, selling under its own brand name, Ford which sells under Motorcraft name, and Chrysler which sells under the Mopar brand name (Reichers 646).

3. Bosch GmbH-Bosch U.S.

107. Ignition parts manufactured by Bosch GmbH are sold in the Federal Republic of Germany to Bosch U.S. (Bosch GmbH Int. No. 21). Bosch GmbH supplies 90 percent of Bosch U.S.'s requirements for the automotive ignition parts aftermarket (CX 88 p. 29). Sales of ignition parts[8] to Bosch U.S. have [19] been as follows (in thousands of U.S. dollars*):

	1976	1977	1978
1. Points (contact sets)	2199	2064	2281
2. Condensers	1662	1281	1328
3. Caps	1050	799	1079
4. Rotors	780	528	626
5. Ignition Coils and Resistors	744	530	781

[8] The definition of the ignition line was broader for the purposes of the interrogatories than that given by the testimony of the industry witnesses (*Compare* Finding 99).

	1976	1977	1978
6. Ignition Kits	397	285	269
7. Cap and Rotor Kits	164	152	233
8. Switches	1102	1310	1114
9. Alternators (and parts thereof)	1870	1923	2286
10. Generators (and parts thereof)	3060	2203	2914
11. Starters (and parts thereof)	4173	4015	3405
12. Regulators	2046	2476	1678
13. Vacuum Controls	-	-	-
14. Distributor Bushings	-	-	-
15. Distributor Leads	346	541	662
16. Horns	209	120	436

* All figures are approximate, owing to exchange rate fluctuations (Bosch GmbH Int. No. 21 at 27-28).

108. Bosch U.S., in addition to carrying Bosch GmbH ignition parts, which is the primary source of supply, also purchased such products from Japanese and domestic sources (Fiene 1332; Bendixen 900).

109. Bosch U.S.'s fast moving items constitute the majority of its sales of ignition parts in the United States (Wagner 1275).

110. Bosch U.S. made the following sales in 1978 of the products indicated:

(a)	points (contact sets)	(a)	$3,144,349.
(b)	condensers	(b)	1,465,802.
(c)	caps	(c)	998,896.
(d)	rotors	(d)	708,404.
(e)	ignition coils and resistors	(e)	978,335.
(f)	ignition kits	(f)	711,015.
(g)	cap and rotor kits	(g)	299,564.
(h)	switches, relays and solenoids	(h)	1,872,460.
(i)	alternators (and parts thereof)	(i)	4,053,702.
(j)	generators (and parts thereof)	(j)	4,384,031.
(k)	starters (and parts thereof)	(k)	9,310,463. [20]
(l)	regulators	(l)	2,200,671.
(m)	vacuum controls	(m)	150,670.
(n)	distributor bushings	(n)	-0-
(o)	distributor leads	(o)	-0-
(p)	horns	(p)	48,590.

(Bosch U.S. Int. No. 33)

111. Certain of the fast moving items in the Borg-Warner and Bosch ignition lines are interchangeable for example:

Contact Set (Points)

Borg-Warner part number A 515 is interchangeable with Bosch part number 1–237–013–026 (CX 4Z–191; 17Z–121).

Condensers

Borg-Warner part number G 582 is interchangeable with Bosch part number 1–237–330–067 (CX 4Z–210, 17Z–38 through Z–43).

Distributor Caps

Borg-Warner part number C 541 is interchangeable with Bosch part number 1–235–522–027 (CX 4Z–196, 17Z–113 through Z–114).

Rotors

Borg-Warner part number D 555 is interchangeable with Bosch part number 1–234–332–074 (CX 4Z–202, 17Z–89 through Z–91).

112. The four most popular ignition parts are points, condensers, distributor caps and rotors (Bendixen 920). In its 1977 and prior year catalogs, Borg-Warner offered extensive coverage of the four most popular ignition parts having application on Volkswagens, Toyotas and Datsuns (CX 3A through Z–36, 4A through Z–248, 5A through Z–6). As shown by the following table, Borg-Warner's coverage for such vehicles in general was comparable to that of Bosch U.S. and three firms that Bosch U.S. considers among its chief competitors, Filko, Wells and A.C. Delco (Bendixen 922). [21]

MODELS THRU 1976

Company	Points (contact sets) Part Numbers Offered			Condensers Part Numbers Offered			Distributor Caps Part Numbers Offered			Rotors Part Numbers Offered			Exhibit No.
	Datsun	Toyota	Volkswagen	Datsun	Toyota	Volkswagen	Datsun	Toyota	Volkswagen	Datsun	Toyota	Volkswagen	
Borg-Warner Corp.	2	2	7	4	3	9	5	3	6	2	4	6	CX 3S, Z-32, Z-34; CX 4U, Z-32, Z-34; CX 5J, W
Robert Bosch Corp.	3	5	4	4	4	11	5	5	5	2	4	8	CX 17Z-11-Z-17, Z-96-Z-103, Z-104-Z-123
General Motors A.C. Delco (Delco-Remy)	2	3	3	2	3	4	2	4	2	1	2	2	CX 98 at 234, 241, 243-44
Filko	3	5	8	5	3	10	5	4	5	3	4	9	CX 99 at 74-75 88-90
Wells Mfg. Corp.	2	3	8	3	3	15	4	5	5	2	3	8	CX 100 at 123, 143, 146-47 [22]

E. *Carburetor Tune-Up Kits*

1. The Product

113. Carburetor tune-up kits are kits that contain the necessary parts to tune up a particular carburetor (Reichers 644; Wildermuth 1396). They are generally considered to be a separate line of parts in the automotive parts aftermarket (Weber 778). Carburetor kits are used in the repair of both domestically produced and foreign made vehicles (CX 16A–Z–43).

114. Carburetor kits vary depending on the characteristics of the particular carburetor (Wagner 1246–47). Kits made for a specific application must be used for that purpose (Wagner 1246).

2. Borg-Warner

115. Borg-Warner manufactures carburetor kits (Reichers 624). The coverage of the Borg-Warner auto parts division carburetor kit line is the broadest in the industry (Reichers 644). It covered the major portion of domestic car applications, light trucks, other gasoline engines, stationary equipment, tractor and farm equipment and some import cars (Reichers 645).

116. In 1978, the Borg-Warner Automotive Parts Division sales of carburetor kits to WDs amounted to approximately $4.1 million. Of that percentage, no more than 5 percent or $205,000 were for import car applications (Reichers 645;[9] BWX 34A *in camera*).

117. Borg-Warner distributed and sold carburetor kits under its own brand to WDs (CX 2B, *in camera;* BWX 25A). It also sold carburetor kits under private label to other auto parts suppliers, including Bosch U.S. and Lucas, a competitor of Bosch U.S. (Wagner 1245–46).

118. Borg-Warner advertises that its line of carburetor kits is "super consolidated" and that "most kits cover several applications. So they're easy to stock" (CX 70C). [23]

119. Borg-Warner advertises Volkswagen carburetor kits as one of its fastest moving items (BWX 25A; Wagner 1248), representing in pertinent part as follows:

> Get big savings on the big movers [including kit No. 10272C SL1-Volkswagon] . . .
>
> The 18 kits in the table are the fastest movers. In fact, they account for almost 50% of carb kit sales. . . . (BWX 25A).

120. Borg-Warner advertises that it is the largest supplier of carburetor kits including domestic and foreign applications (Reichers 743; CX 70A-C). Its advertisement in the June 1979 issue of Motor Magazine states in pertinent part:

[9] This figure does not include Borg-Warner sales of carburetor kits to non WDs.

Coverage [of carburetor kits] is current—and the broadest in the market: domestic cars, trucks, and imports. . . . (CX 70A-C).

121. WDs advertise that they carry Borg-Warner carburetor kits with application on both domestic and imported vehicles (CX 96H).

3. Bosch U.S.-Bosch GmbH

122. Bosch U.S. sells carburetor kits which it purchases from Borg-Warner made especially for Bosch U.S. under a private label pursuant to Bosch U.S.'s specifications (Finding 117; Wagner 1245). It markets a full-line of carburetor kits for foreign made vehicles (Weber 867).

123. Bosch U.S.'s 1978 sales of carburetor kits amounted to $151,197 (Bosch U.S. Int. No. 33 q at 31).

124. The coverage of Robert Bosch's carburetor kits with application on foreign made cars compared with Borg-Warner's coverage of carburetor kits for foreign made cars is "comparable or close to being the same, since Borg-Warner manufactures them for us [Bosch U.S.]" (Wagner 1273; Bendixen 930).

F. *Wire And Cable*

1. The Product

125. Wire and cable is a distinct line of automotive replacement parts including the following products: [24]

(1) Battery cable
(2) Ignition wire/cable sets (referred to herein as "ignition sets")
(3) Terminals and connectors
(4) Bulk wire
(5) Pigtails and sockets
(6) Spark plug connectors

(CX 15A through Z–80, 17A through Z–135; Nelson 607)

126. An ignition cable set or "ignition set" consists of a group of cables of various lengths with appropriate connectors which link the distributor to the spark plugs (CX 72B-C; Nelson 507, 512, 514).

127. There are several varieties of ignition sets including "universal" ignition sets and "custom" ignition sets (CX 15Z–30 through Z–43; Nelson 504).

128. A "Universal" ignition set is one which can be adapted to a wide number of applications by cutting the wire to fit (Reichers 642; Nelson 506). A universal set is not uniquely tailored to a particular application (Nelson 506, 595). Custom sets are tailored more closely to particular applications (Nelson 595–96).

129. Universal sets may be used for both foreign and domestic car applications (Finding 136).

130. Certain custom ignition sets have application on both domestically and foreign made vehicles (CX 15Z–34 through Z–35).

131. Ignition sets are made from two types of material, copper wire and resistance core wire (Nelson 610). Domestically produced vehicles generally use resistance core wire as original equipment while foreign made vehicles generally use copper wire as original equipment (Nelson 600–01).

132. A WD may carry more than one line of wire and cable (Weber 834–35;[10] Flicker 1193). **[25]**

2. Borg-Warner

133. Borg-Warner has a wire and cable line that covers the majority of domestic car applications and some import car applications (Reichers 641).

134. In 1978, the sales of the Borg-Warner Automotive Parts Division wire and cable lines were approximately $2.9 million. Of those sales about 2 to 3 percent or $58,000 to $87,000 were for import car applications (BWX 34A, *in camera;* Reichers 643–44).

135. Borg-Warner's wire and cable is a glass core-wire (not copper); it has a higher resistance to TV-radio interference and is a more intricately engineered product than copper wire (Reichers 641). Other types of wire and cable can be used for the same application as resistance core sets (Johnson 1014–15). **[26]**

136. The Borg-Warner Universal Ignition sets, RH 11 and RH 13, are examples of universal sets which have application to a wide variety of domestic and foreign cars as demonstrated by the following entries in the Borg-Warner catalogue:

[10] For example, P.E. Weber has as its primary wire and cable line products manufactured by AAA Specialty Company and keeps a minimum inventory of Borg-Warner wire and cable (Weber 834–35).

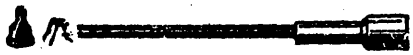
4 CYLINDER UNIVERSAL SETS

RH11

Straight Dist. Nipple
Right Spark Plug Boot

American Motors	1978-77
Audi	1977-70
Bobcat	1976-75
Chevrolet Truck	1965-63
Foreign Cars	1977-52
Jeep	1971-65
Mustang II	1976-74
Nova	1970-62
Pinto	1976-71
Scout	1972-61
Vega	1974-71

6 CYLINDER UNIVERSAL SETS



RH13

Straight Dist. Nipple
Straight Spark Plug Boot

American Motors	1978-58
Bronco	1974-66
Buick Prod.	1974-73; 71-62
Checker	1974-61
Chevrolet & Truck	1974-46
Dodge & Truck	1978-58
Ford Prod.	1976-54
Foreign Cars	1977-56
GMC Truck	1974-50
IHC Truck	1974-70; 64-61
Jeep	1976; 74-66; 64; 62-56
Nash	1956-50
Oldsmobile	1974-64
Plymouth	1978-60
Pontiac	1974-64
Studebaker	1966-65

(CX 15Z–30)

137. Some of Borg-Warner's Custom Ignition sets apply to both domestic and import cars. One custom ignition set CH 410 is made for Volkswagen model years 1977–53 alone (CX 15Z–34). In this connection, the Borg-Warner Wire and Cable catalogue dated April 1978 represents as follows: [27]

CUSTOM IGNITION SETS

THE PROVEN LINE THAT SERVES ALL YOUR TUNE-UP NEEDS

KOOLWIRE

4 CYLINDER

CH410
Straight Dist. Nipple
Special Spark Plug Boot
Volkswagen 1977-53

CH412
Right Dist. Nipple
Special Spark Plug Boot
Vega 1974-71

CH413
Straight Dist. Nipple
Straight Silicone Spark Plug Boot
American Motors 1978-77
BMW 1977
Pinto 1974-71
Saab 1974-71

CH414
Straight Dist. Nipple
Straight Spark Plug Boot
Datsun 1973-65
Honda 1977-73
Int. Scout 1977-75; 72-61
Mazda 1977-71
Saab 1977-75

CH415
Straight Dist. Nipple
Straight Silicone Spark Plug Boot
Int. Scout 1978
Mustang II 1974
Pinto 1974
Saab 1977

CH416†
Right Dist. Nipple
Elongated Straight Silicone
Spark Plug Boot
Bobcat 1976-75
Capri 1976-75
Courier 1978-77
Mustang II 1976-75
Pinto 1976-75

CH417†
Special Dist. Nipple
Special Spark Plug Boot
Astre 1976-75
Monza 1977-75
Starfire 1977
Vega 1977-75

†Silicone wire

6Ω

CH418
Straight Dist. Nipple
Straight Spark Plug Boot
Arrow 1977-76
Audi 1977-74
BMW 1974-66
Colt 1975-71
Fiat 1973-69
Honda 1975
Mazda 1976

CH419
Straight Dist. Nipple
Right Spark Plug Boot
Cricket 1973-71
Datsun 1977-74
Fiat 1977-74
MG 1977-69
Renault 1977-76; 73-72
Triumph 1977-74

CH420
Straight Dist. Nipple
Straight Spark Plug Boot
Fiat 1975-67
Ford (English) 1970-64
Mazda 1977-70
Opel 1973-69
Saab 1973-70
Subaru 1977-73
Toyota 1977-75
Triumph 1977-75

CH421
Straight Dist. Nipple
Straight Spark Plug Boot
Audi 1977-75
Austin 1975-69
Courier 1975-72
Datsun 1973-64
Fiat 1977-76
Mazda 1977
Opel 1975-74
Renault 1973
Toyota 1974-68
Triumph 1973-69
Volkswagen 1977-74
Volvo 1975-68

CH422†
Special Dist. Nipple
Elongated Straight Silicone
Spark Plug Boot
Bobcat 1978-77
Capri 1977
Fairmont 1978
Fiesta 1978
Mustang II 1978-77
Pinto 1978-77
Zephyr 1978

CH423†
Special Dist. Nipple
Elongated Straight Silicone
Spark Plug Boot
Astre 1978-77
Monza 1978
Starfire 1978
Sunbird 1977
Ventura II & Phoenix 1978-77

CH424†
Special Dist. Nipple
Elongated Straight Silicone
Spark Plug Boot
Chevette 1978-77

6 CYLINDER

CH610
Straight Dist. Nipple
Special Spark Plug Boot
Corvair 1965-61

CH612
Straight Dist. Nipple
4 Right Spark Plug Boots
2 Straight Spark Plug Boots
Ford Prod. 1966-63

CH614
Straight Dist. Nipple
Straight Spark Plug Boot
G.M.C. Truck 1978-30

CH615
Straight Dist. Nipple
Straight Spark Plug Boot
Ford Prod. 1978-63
G.M. Prod. 1978-62
Studebaker 1966-63
Volvo 1975-70

CH616
Straight Dist. Nipple
Straight Spark Plug Boot
American Motors 1978-70; 61-58
Chevrolet Prod. 1965-58
Chrysler Prod. 1978-71
Corvette 1965-63
Ford Prod. 1965-63
G.M.C. Truck 1978-58
International Truck 1966-
Jeep 1978-66
Toyota 1977-70
Triumph 1977-

[28] 138. Borg-Warner offers custom ignition sets incorporating resistance core wire for application on foreign made vehicles (CX 15Z–34 through Z–35, Z–39 through Z–41; Nelson 610).

3. Bosch U.S.-Bosch GmbH

139. Bosch U.S. sells spark plug connectors and ignition wire. It does not sell battery cables, terminals or connectors, bulk wire or pigtail and sockets (Bendixen 899). Bosch U.S.'s wire and cable sales are limited to import car applications (Bendixen 898). Ignition cable sets is the only wire and cable product Bosch U.S. has (Bendixen 899).

140. Bosch GmbH is not in the wire and cable business and Bosch U.S. buys domestic wire and cable so that it will have a full line of parts (Fiene 1338; CX 88 p. 34). It buys bulk cable and will cut and fit it as required for hook-up leads (CX 88 p. 34).

141. Bosch U.S. sells a full line of ignition cable sets for import applications (Weber 867). They are the same as original equipment. Import cars are equipped with wire sets whose main ingredient is copper (Wagner 1244). U.S. domestic cars, on the other hand, require radio suppressant wire and copper is not an ingredient of that product (Wagner 1244).[11]

142. The Bosch U.S. ignition sets are offered exclusively for foreign applications (CX 17; Wagner 1262, 1264–66).

143. In the case of wire and cable, *i.e.,* ignition sets, Borg-Warner has an application for almost all the fast moving foreign car applications covered by Bosch U.S. (Nelson 513–14; CX 15, 17Z–135 *et seq.*).

144. The record gives no specific figure for sales by Bosch U.S. of ignition or cable sets. The sales volume for 1978 given for wire and cable products in respondent's interrogatory response was $858,027 (Bosch U.S. Int. No. 33 r at 30–31).

G. *Competition Between Borg-Warner And Bosch U.S. In Automotive Parts*

145. Borg-Warner and Bosch U.S. both sell to domestic WDs who also sell automotive parts for import car applications (Findings 78, 86–87, 96). In fact, both Borg-Warner and Bosch [29] U.S. are manufacturer members of the same trade association of "traditional" WDs (Findings 73, 87, 96). Borg-Warner does not sell to WDs specializing in import parts (Finding 87).

146. Seventy percent of Bosch U.S.'s WD customers are domestic WDs in the same category as Borg-Warner's customers (Findings 96–97). They account for 30 percent of Bosch U.S.'s business with WDs (Findings 90, 98).

147. Borg-Warner's Auto Parts catalogues have entries expressly

[11] Imported cars use a suppressor connector to perform that function (Wagner 1244).

devoted to import car applications in the relevant product lines (CX-3; Findings 112, 136, 137).

148. Borg-Warner advertises in the trade press that it sells auto parts for domestic and import applications (Findings 119–20). WDs advertise that they carry Borg-Warner carburetor kits with application on foreign and imported vehicles (Finding 121).

149. Borg-Warner commenced selling import car parts to domestic WDs because of "popular demand" from such distributors (Finding 86).

150. Borg-Warner offers a short line of auto parts generally for fast moving import parts (ignition parts and wire and cable sets). In the case of carburetor kits the Borg-Warner/Bosch U.S. offerings are comparable (Findings 102, 124, 133).

151. Bosch U.S. offers essentially a "full" line of automotive parts in the relevant products for import car applications (Findings 92, 141).

152. Certain of Bosch U.S.'s advertisement for import car parts appear in trade magazines whose circulation includes domestic WDs (Finding 95).

153. Bosch U.S.'s "full" line of import parts cannot be substituted for Borg-Warner's entire line of automotive parts which includes a full line of parts for domestic applications in addition to a short line of fast moving parts for import applications (Findings 85, 92, 102).

154. WDs do not always buy a "full" line of parts; they may also purchase a "short" line fast moving parts depending on demand in their area (Findings 76, 88). Domestic WDs have the choice of buying a fast moving line of auto parts in the **[30]** relevant products for application to popular import cars from either Bosch U.S. or Borg-Warner, or from both.[12]

155. A WD who does dual line has the choice of allocating his purchases among two suppliers where their lines overlap. He may, for example, carry a minimum inventory in one line (Finding 132 n. 10).

156. A supplier with a "short" line of fast moving parts can compete against a full line of automotive replacement parts (Finding 66).

157. Since Bosch U.S. offers a "full" line of auto parts for import car applications (Finding 92) it of necessity covers the fast moving parts for popular import car applications. The Bosch U.S. and Borg-Warner lines of automotive products overlap in fast moving import car parts for the relevant products in sales to domestic WDs (Findings 85, 102, 111–12, 124, 136–37). Bosch U.S. and Borg-Warner compete in the sale of fast moving ignition parts, carburetor kits, and wire and cable to domestic distributors for popular import cars.

158. Bosch GmbH competes with Borg-Warner in the marketing of

[12] While many WDs do not dual line because of inventory problems this is a choice which is open to them (Wildermuth 1406–07; Findings 77, 132).

the relevant automotive replacement parts for application to popular import cars to domestic WDs by virtue of the operations of Bosch U.S. (Findings 33–61).

V. HYDRAULIC PRODUCTS

A. *The Hydraulic Products Market*

159. Hydraulic products actuate mechanical devices using fluids under pressure (CX 77E).[13]

160. Hydraulic pumps convert "mechanical horsepower from a source, such as a diesel engine, into fluid horsepower to provide the work force necessary for hydraulic cylinder or hydraulic motor activation" (CX 77H).

161. Hydraulic valves control "the work to be done by a cylinder or a motor" (CX 77H). [31]

162. Gear motors or hydraulic motors are "used to convert energy in a fluid to continuous mechanical rotary motion and torque. In design and construction, hydraulic gear motors are virtually identical to pumps" (CX 77I).

163. Products in the hydraulic industry consist primarily of pumps, valves, motors, cylinders, hoses, and fittings which are marketed through distributors and direct to original equipment manufacturers (OEMs) (CX 77L).

164. There are two types of hydraulic directional control valves: Monobloc valves which contain all the required control circuits in one body and stack valves, comprised of individual sections which can be stacked to provide the required number of control circuits (CX 81A, *in camera*).

164. The U.S. hydraulics market is divided into three different areas: areospace, industrial, and mobile (Trauscht 1084). The mobile equipment area includes all types of agricultural tractors and related equipment, rider-type lift trucks, light and medium construction equipment, over the road trucks, and miscellaneous equipment such as winches, booms and auxiliary power units (CX 76E, *in camera*). Industrial hydraulic applications include hydraulic package units, lifts, machine tools, mining machinery, presses, etc. (CX 77L).

166. In the United States competition among hydraulic products suppliers is mainly in parts, not so much in systems. Systems are, for the most part, designed by manufacturers, dealers, hydraulics distributors, or machine tool builders. They will buy components and put together a system (Weisse 1518).

167. The European market for hydraulic products in 1974 was high

[13] "General fluid power systems are those that transmit and control power through use of a pressurized fluid (liquid or gas) within an enclosed circuit" (CX 77H).

pressure designed. The U.S. market then and now is low pressure designed (Weisse 1484–85; Weltyk 1285; Trauscht 1109).

168. European dimensions for hydraulic products are metric while the U.S. dimensions are in feet and inches (Trauscht 1109).

169. In the mobile sector, hydraulics manufacturers deal with original equipment manufacturers (OEMs) who tend to set systems specifications including mounting location and the location for ports on valves (Weltyk 1287). In such a case, the hydraulics manufacturer custom designs a valve for their applications (Weltyk 1287).

170. Selling hydraulic products to OEMs of mobile equipment involves the following process. Manufacturers of products such as trucks, earth moving machinery, cranes, etc. design the entire piece of equipment. Such OEMS tend to set the system specifications. For example, the OEMs determine the mounting location, and where they want the ports on the valves. The manufacturer of hydraulic products in essence designs a valve [32] for the OEM and attempts to convince the OEM with tests and development work that the valve will meet the specifications set. The OEM then tests the valve to determine whether the specifications have been met. Subsequently, the product is tested for durability (Weltyk 1287).

171. Some distributors design their own hydraulic systems and use hydraulic components in these systems or they may sell components to end users such as machine tool manufacturers (Weisse 1499).

B. *Borg-Warner*

172. Borg-Warner designed, manufactured, marketed and serviced hydraulic gear pumps, motors and pressure compensated stack type directional control valves and special control valves for hydraulic systems (CX 77H). Its hydraulic product line consisted primarily of gear pumps and stack valves (Weltyk 1283). It also supplied custom-designed hydraulic control systems (CX 77J).

173. The principal thrust of Borg-Warner's gear pump business was an attempt by the engineering department to convince a customer that they could come up with a good technical answer to his problem and to price the product properly (Trauscht 1087). Borg-Warner's valve business, on the other hand, involved principally contract manufacturing. In this area, Borg-Warner was not selling strong technology but rather manufacturing to the prints of the customer (Trauscht 1087).

174. Borg-Warner's hydraulic product line was limited primarily to gear pumps and stack valves (Weltyk 1283); its production was confined to gear pumps, motors, and valves (Trauscht 1086), and it sold no accumulators or piston pumps.

175. In 1978, the approximate annual sales of Borg-Warner's hy-

draulics division were approximately $18 million. Of that amount $15 million represented domestic sales and $3 million represented overseas sales (Trauscht 1071).

176. The top 10 customers of the Borg-Warner hydraulics division were OEMs of mobile equipment such as John Deere and International Harvester. Sales to them constituted 80 percent of total sales (Trauscht 1087–88; Weltyk 1287–88).

177. Borg-Warner's hydraulics division made no effort to serve the industrial segment of the hydraulics market through distributors. Rather, the sales of Borg-Warner hydraulic products to distributors were for replacement parts for original mobile equipment (Trauscht 1154–55; *see also* BWX 29D).

178. Borg-Warner tried to sell systems to OEMs in the United States but not overseas (Weltyk 1288). Borg-Warner was [33] not in the overseas market except to supply U.S. design hydraulic products to production facilities of U.S. companies overseas (Trauscht 1088–89, 1131 *in camera).*

179. In July 1979, Borg-Warner sold its Hydraulics Division to Rexroth, a subsidary of Mannesmann A.G. (Borg-Warner Int. No. 1 at 3–4).

C. *Bosch GmbH-Bosch U.S.*

180. The Bosch GmbH hydraulics product line is comprehensive; in addition to gear pumps it carries radial piston pumps, positive displacement pumps, and a complete line of directional flow valves (Weltyk 1283–84).

181. Bosch GmbH supplies hydraulic valves, gear pumps, and motors to Bosch U.S. (CX 88 p. 34–35; Bosch GmbH Int. No. 27). Approximate sales by Bosch GmbH to Bosch U.S. of hydraulic valves were as follows:

1976:	$ 36,000
1977:	$ 57,000
1978:	$533,000

(Bosch GmbH Int. No. 27)

Sales of hydraulic gear pumps and motors by Bosch GmbH to Bosch U.S. were as follows:

1976:	$ 19,000
1977:	$ 62,000
1978:	$325,000

(Bosch GmbH Int. No. 28)

182. Bosch U.S. started in the hydraulics business around 1974

(Weisse 1484). The approximate sales volume of hydraulic products by Bosch U.S. was the following:

1975:	$ 200,000
1976:	400,000
1977:	700,000
1978:	1,720,000

(Weisse 1487–88) [34]

183. In 1978, Bosch U.S.'s sales volume for hydraulic valves was $624,242 while its sales volume for hydraulic gear pumps and motors was $29,000 (Bosch U.S. Int. No. 33 s–t at 30–31).

184. In evaluating the hydraulics market, it was decided that Bosch U.S. would sell products made in Europe in the United States, namely products designed for metric systems (Weisse 1485). At that time, the European market was already using high efficient systems such as high pressure/low volume and it was anticipated that the U.S. market would go in that direction. Furthermore, the typical U.S. hydraulic systems did not use accumulators and this is one of the target areas in which Bosch U.S. wanted to go (Weisse 1485).

185. The first products which Bosch U.S. sold in the American market, beginning in 1974, were accumulators and radial piston pumps (Weisse 1487). These products were imported from Germany (Weisse 1486). The Bosch U.S. hydraulic products line now encompasses accumulators, radial piston pumps, directional control valves, electronic hitch control systems, gear pumps and certain other valves (Weisse 1487).

186. In 1976–77, Bosch U.S. started an assembly operation of accumulators in the United States (Weisse 1486).

187. Up to that point all accumulators were imported from Germany (Weisse 1486–87). Subsequently, Bosch U.S. started manufacturing of accumulators in the U.S. (Weisse 1487). Sales of accumulators comprise 40 percent of its dollar turnover in hydraulic products (CX 88 p. 35; Fiene 1337). Some of the high pressure parts are, however, still secured from Germany (Weisse 1487).

188. The hydraulics business of Bosch U.S. is basically industrial (Weisse 1502).

189. Bosch U.S. distributed its hydraulic products through dealers and OEMs. Forty percent of Bosch U.S.'s hydraulic sales were to OEMs and the balance to distributors purchasing primarily accumulators, radial piston pumps, some industrial valves, and a limited number of industrial gear pumps (Weisse 1487, 1498).

190. Bosch U.S. began selling to OEMs in the period 1977–78 (Weisse 1514). Original equipment manufacturers in the U.S. who were customers of Bosch U.S. were Clark Equipment, Massey-Ferguson, Husky Injection Molding System and Mobay Chemical Corp.

Bosch U.S. sells only accumulators to Husky, and sells radial piston pumps to Mobay. In 1978, Bosch U.S. began delivering electronic hitch controls and directional valves to Massey-Ferguson designed by Bosch U.S. in accordance with Massey-Ferguson specifications. Bosch U.S. started selling tandem gear [35] pumps to Clark Equipment the following year (Weisse 1495–97, 1522).[14]

191. Bosch GmbH collaborates with Bosch U.S. in hydraulics sales to the Massey-Ferguson Company with respect to engineering and specification requirements as well as applications. This is tied into the Bosch worldwide relationship with Massey-Ferguson trying to achieve uniform application and interchangeability, as, for example, in Europe and Brazil (CX 88 p. 35–36).

192. International Harvester, a U.S. OEM, also produces tractors in Germany which are equipped with Bosch "hydraulic components".[15] Such tractors are imported into the United States. Replacement parts for such components would be sold through the Harvester organization. Other domestic OEMs follow similar procedures (Weisse 1521).

193. The gear pumps and valves sold by Bosch U.S. to distributors are generally used by the distributor in industrial systems which the distributor itself designs, or are resold by the distributor to end users such as machine tool manufacturers (Weisse 1499).

194. Bosch U.S. sells accumulators, radial piston pumps and a low quantity of industrial gear pumps to Fauver Company, a distributor (Weisse 1498).

D. *Bosch And Borg-Warner Product Comparison*

195. The gear pump sold by Bosch U.S. is a high efficient pump with high pressure and low volume. Borg-Warner sells low pressure/high volume pumps (Weisse 1502–03). The pump sold by Bosch has a higher efficiency than the generally used systems in the United States. This is a selling point in dealing with OEMs (Weisse 1511–12). [36]

196. The Bosch and Borg-Warner hydraulics lines had gear pumps which were functionally similar (Weltyk 1284),[16] but they were not interchangeable (Weltyk 1285). The Bosch pumps working at a higher pressure are more expensive than the Borg-Warner product (Weltyk 1285).

197. High pressure cannot be used in a low pressure system because it will burst the system (Trauscht 1112). Use of low pressure components in a high pressure system would be inefficient (Weltyk 1285–86).

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[14] Borg-Warner did not have an electronic hitch control system and its directional control valves were not suitable for Massey-Ferguson. Borg-Warner did not sell a tandem gear pump (Weisse 1497). Nor did it sell accumulators or piston pumps (Finding 174).

[15] The record is unclear as to precisely what hydraulic components were involved. It is conceivable that Bosch high pressure gear pumps (*See* Tr. 1521 line 11) and valves were involved, but the testimony does not go into detail on this point.

[16] Pumps which produce a pressure and flow of a given magnitude are similar (Weltyk 1284–85).

198. The primary offering of the Borg-Warner hydraulics division was a stack valve and Bosch offered a similar valve. The valves of Bosch and Borg-Warner, like their gear pumps, however, differed physically in that they are designed to work at different pressures, have different mounting locations, and metric versus U.S. threads and fittings (Weltyk 1286).

199. The pump porting, the location of the ports, the kind of threads and fittings in the ports, the mounting bosses and their location, and the outlines of the gear pumps were different in the Bosch GmbH and Borg-Warner lines (Weltyk 1285).

200. Hydraulic line fittings on the gear pumps of Bosch and Borg-Warner did not match so they were not interchangeable (Weisse 1509).

201. Although the components such as gear pumps of low pressure and high pressure hydraulic systems are not interchangeable, a high pressure system can perform the same function as a low pressure system (Weisse 1505–06, 1511). For example:

> If you have a big bulldozer, and you want to move a certain number of dirt, . . . and use hydraulic power for that, you can use a high-pressure system.
>
> That means the whole system, that means pumps, pistons, valves, oilflow valves—controls, valves, but you have to design the system for that high pressure.
>
> And that certain hydraulic liquid flow. If you use the low-pressure system, you want [37] to do the same job, you need, because the pressure's lower, a higher flow rate, and you need for that purpose all of the components matched to that lower flow rate.
>
> That means you will have, instead of, I would say, a four-inch piston on the backup, on the high-pressure system, a five-, no, a six-inch piston on the low-pressure system.
>
> That is about the relationship . . . (Weisse 1506).

202. Bosch's line of hydraulic valves exceeded that of Borg-Warner (Weltyk 1286–87).

203. Bosch U.S. catalog specifications, with some possible exceptions, are metric (Weisse 1517). Bosch U.S., however, will sell hydraulic equipment in inches or SAE thread to an OEM customer or to a high volume customer (Weisse 1514; *see also* Trauscht 1172). All Bosch products can be easily manufactured to SAE dimensions, and Bosch as of 1976 was manufacturing certain of its products to SAE dimensions (CX 36C).

E. *Evidence On Competition Pertaining*[17] *To Borg-Warner And Bosch-Bosch U.S.*

204. The Borg-Warner hydraulics division only participated in the

[17] Respondents' documents pertinent to this issue are discussed below at pages 51–52.

mobile portion of the hydraulics market (Trauscht 1086; BWX 29D).

205. Bosch U.S. sells hydraulic products primarily to the industrial part of the market (Finding 188). Bosch U.S. sold gear pumps and valves to distributors generally for use in industrial systems, designed by the distributors or resold by distributors to end users such as machine tool manufacturers (Findings 189, 193). It also made sales to mobile equipment OEMs (Findings 189–91).

206. Massey-Ferguson is an important customer of Borg-Warner (BWX 29K) to whom Bosch U.S. also sells. However, the products which Bosch U.S. sold to Massey-Ferguson, according to this record, were not marketed by Borg-Warner (Finding 190 and n. 14). [38]

207. There is one hydraulics distributor, Fauver Company, which both Bosch U.S. and Borg-Warner supply (Weisse 1506–07). Bosch U.S. sales to distributors involved parts generally for industrial use (Finding 193). Borg-Warner sold hydraulic parts to distributors as mobile equipment replacement parts (Finding 177). Accordingly, no finding can be made without more evidence that Bosch U.S. and Borg-Warner competed in the case of this customer.

208. Bosch U.S. and Borg-Warner hydraulic valves and gear pumps, although performing the same function, were not interchangeable because of significant physical and performance characteristics (Findings 195–200).

209. Hydraulic systems can be designed, so as to overcome product differences, so as to utilize either high pressure (Bosch) or low pressure (Borg-Warner) parts in order to perform the same function (Finding 201). There is no evidence in the record giving concrete instances as to how this worked out in practice as far as Borg-Warner or Bosch U.S. were concerned. There is accordingly no way of determining with confidence from this record whether Bosch U.S. and Borg-Warner competed in the bidding or design stage of marketing hydraulic products in the mobile part of the U.S. hydraulics market.[18]

210. No finding can be made that Borg-Warner and Bosch U.S. compete in the sale of hydraulic products to the hydraulic products market in the United States (Findings 201, 209).

211. European and Japanese suppliers of hydraulic products had not been successful in their attempts to sell in the United States; in general their product offerings were not compatible with the United States market (Weltyk 1288–89).

212. Borg-Warner, whose hydraulic product designs were more suitable for low pressure applications and systems had made no serious attempts to sell overseas (Weltyk 1290). Essentially, Borg-Warner's

[18] The same considerations apply to evidence that Bosch GmbH made sales in Europe to U.S. mobile equipment OEMs (Finding 192).

overseas sales were confined to sales of U.S. design hydraulic products to production facilities of U.S. companies overseas (Finding 178).

213. The record will not sustain a finding that Borg-Warner and Bosch GmbH competed overseas in the sale of hydraulic products (Findings 178, 192, 209 and n. 18). **[39]**

IV. AUTOMOTIVE AIR CONDITIONING COMPRESSORS

A. *Femsa, Inc.*

214. Femsa, Inc. is a Texas corporation, incorporated in 1976, whose principal place of business is 5324 Highway 75 North, Sherman, Texas (RBGX 1D, G-H).

215. The parent company of Femsa, Inc. is Fabrica Espanola Magnetos (Femsa-Madrid) (RBGX 1H). Femsa-Madrid is owned 34 percent by Bosch Internationale[19] and 17 percent by Bosch GmbH (Bosch GmbH Verified Supplemental Answer to Int. No. 29 p. 17 dated Oct. 10, 1979).

216. Femsa, Inc. is a wholly-owned subsidiary of two entities, Femsa-Luxenbourg (FEMLUX) and Femsa-Madrid. Seven thousand five hundred of Femsa, Inc.'s shares are owned by Femsa-Madrid and 5,000 by FEMLUX (RBGX 1Z). FEMLUX is a subsidiary of Femsa-Madrid (RBGX 1Z).

217. Dr. Herman Scholl is the Vice President and a member of the board of directors of Femsa-Madrid (CX 90). He is currently a member of the board of management of Bosch GmbH and has been a member of that board since January 1975 (Bosch GmbH Int. No. 10 at p. 15).

218. Dr. Alfred Hetzel is a member of the board of directors of Femsa-Madrid (CX 90). He is currently a member of the board of management of Bosch GmbH and has been a member of that board since January 1972 (Bosch GmbH Int. No. 10 at 15).

219. Daniel Cuevas Ruiz is chairman of the board of directors of Femsa, Inc. He is also Femsa-Madrid's director of sales (RBGX 1B-C, R-S).

220. Joaquin Elola-Olaso Arraiza is a member of the board of directors of Femsa, Inc. (RBGX 2B). Mr. Arraiza is Secretary and a member of the board of directors of Femsa-Madrid, in charge of finances (CX 90; RBGX 1S).

221. Ignacio Eguilior Y Puig De La Bellacasa is a member of the board of directors of Femsa, Inc. (RBGX 2B). Mr. Bellacasa is an employee of Femsa-Madrid (RBGX 1S). **[40]**

222. Jose Manuel Perez Echeverria is the Executive Vice President and a member of the board of directors of Femsa, Inc. (RBGX 2B). Mr.

[19] Bosch GmbH owns more than 50 percent of the stock of Bosch Internationale (Fiene 1329).

Echeverria was, until recently, in charge of Femsa-Madrid's activities outside of Spain (RBGX 1S).

223. Jose Luis Magica Yanguas is Secretary and a member of the board of directors of Femsa, Inc. (RBGX 2B). Mr. Yanguas is a member of the board of directors of Femsa-Madrid and is Femsa-Madrid's corporate lawyer (CX 90; RBGX 1S, 2C).

224. The president of Femsa, Inc. makes the policy and day-to-day operating decisions for that corporation (RBGX 1Z–27–28).

225. Femsa, Inc. has not been contacted in the course of its business by personnel from Bosch GmbH (RBGX 1Z–28).

226. Femsa, Inc. satisfies the warranty on the air conditioning compressors which it sells, not Femsa, Madrid (RBGX 1Z–11).

B. *Marketing Of Automotive Air Conditioning Compressors*

227. Bosch U.S. neither manufactures nor sells automotive air conditioning compressors (CX 88 p. 36).

228. Borg-Warner sells automotive air conditioner compressors through its York Division (Comp. and Borg-Warner Ans. ¶ 11).

229. In 1974, Femsa-Madrid bought the design rights to an automotive air conditioning compressor designed by Frederick E. Pokorny (RBGX 1F, I). Mr. Pokorny became an employee of Femsa-Madrid in 1974 (RBGX 1I). Mr. Pokorny became President of Femsa Inc. on its incorporation in 1976 (RBGX 1J).

230. Femsa, Inc. began selling automotive air conditioning compressors at the time of its incorporation in 1976 (RBGX 1 "O"; Finding 214).

231. Femsa, Inc. sells two piston in line automotive air conditioning compressors with three displacements (RBGX 1Z–6–7). This is the only type of air conditioning compressor which Femsa-Madrid manufactures (RBGX 1Z–7).

232. Such compressors are also manufactured by Tecumseh Products Company, York Division of Borg-Warner, two to three Japanese companies and Aspera Frigo Spa of Italy (RBGX 1Z–7).

233. At this time, there are no rotary automotive air conditioning compressors in production or commercially available (RBGX 1Z–8). [41]

234. Femsa, Inc. imports automotive air conditioning compressors, manufactured in Spain by Femsa-Madrid, which it resells in the aftermarket (RBGX 1N). Femsa-Madrid is the exclusive supplier to Femsa, Inc. of the air conditioning compressors which the latter resells (RBGX 1"O").

235. Femsa, Inc. distinguishes between the "aftermarket" and car manufacturers. Femsa, Inc. sells to manufacturers of air conditioning equipment for new or used cars sometimes at the manufacturer's

level which means that Femsa's customer has a contract with a car manufacturer to install air conditioning units in his cars (RBGX 1Z–9).

236. The York Division of Borg-Warner also supplies air conditioning compressors to such manufacturers of automotive air conditioning equipment (RBGX 1Z–10).

237. Femsa, Inc. has attempted to make sales to OEM manufacturers of vehicles *viz.,* to "Detroit" but has been unsuccessful (RBGX 1Z–10).

238. Femsa, Inc. does not sell automotive air conditioning compressors to warehouse distributors or automotive parts distributors (RBGX 1Z–31).

239. Femsa, Inc. sells automotive air conditioning compressors to the following customers, all located in Texas: Ara Inc., Frigiking, Midchill, Frigete, Estar, and Metrotex (Bosch GmbH Supplemental Ans. to Int. No. 29 p. 16 dated Oct. 10, 1979; *see also* RBGX 1Z–9).

240. Femsa, Inc.'s primary sales area is the Dallas, Arlington and Fort Worth, Texas area (RBGX 1Z–27).

241. The automotive air conditioning compressors sold by Femsa, Inc. will fit any American car that has bracketing made for it and any foreign car that has the physical space and an adapter to take the compressor (RBGX 1Q).

242. Femsa, Inc. sells its products under the trade name Femsa. Femsa, Inc. does not pay a royalty for use of the trade name (RBGX 1Z–11).

243. Femsa, Inc.'s sales of automotive air conditioner compressors have been approximately as follows:

1976:	0
1977:	$ 930,000
1978:	$2,873,000

244. There is insufficient evidence concerning control by Bosch GmbH over Femsa, Inc. or contacts between Bosch GmbH and [42] Femsa, Inc. to support a finding that Bosch GmbH competes with Borg-Warner in the sale of automotive air conditioning compressors or is engaged in commerce by virtue of the operations of Femsa, Inc. (Findings 214–26).

DISCUSSION

This is a proceeding under Section 8 of the Clayton Act, 15 U.S.C. 19, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, challenging interlocking directorates between the Borg-Warner Corporation (Borg-Warner) and Robert Bosch GmbH (Bosch GmbH), a

German corporation, as well as the interlocking directorates between Robert Bosch Corporation (Bosch U.S.), a subsidiary of Bosch GmbH, and Borg-Warner.

There are four prerequisites which must be met before a violation of Section 8 is found. First, one of the interlocked corporations must have "capital surplus and undivided profits aggregating more than $1 million," second, the interlocked corporations must be engaged in commerce and third, the challenged interlock must be between two or more corporations "other than banks, banking associations, trust companies and common carriers." And finally, the interlocked corporations must be or have been competitors so that the elimination of competition by agreement between them would violate one of the antitrust laws.

The issues requiring resolution subsequent to the trial are as follows: (1) do Bosch GmbH and/or Bosch U.S. compete with the Borg-Warner Corporation in the sale of automobile replacement parts,[20] and hydraulic products; (2) do Bosch GmbH and Borg-Warner compete in the sale of automotive air conditioning compressors; (3) is Bosch GmbH engaged in commerce within the meaning of Section 8 of the Clayton Act by virtue of the operations of its subsidiary Bosch U.S. in the United States; (4) if competition between Bosch U.S.-Bosch GmbH and Borg-Warner is shown, is such competition de minimis; (5) if so, is the de minimis defense available under Section 8 of the Clayton Act; (6) does Section 8 of the Clayton Act reach indirect interlocks where companies compete indirectly through a subsidiary; and (7) in the event a Section 8 violation has not been proven are the challenged interlocks contrary to the public policy of Section 8 and thus within the proscription of Section 5 of the Federal Trade Commission Act? **[43]**

A. *Competition*

Respondents deny that competition exists between Borg-Warner and Bosch GmbH and/or the latter's subsidiaries in any of the three relevant product lines, namely, automotive replacement parts, hydraulic products and automotive air conditioning compressors. It was on this issue that most of the ligitation effort was expended.

1. Automotive Replacement Parts

Before turning to the applicable legal principles, a brief review of the record is in order.

Both Borg-Warner and Bosch U.S. sell automotive replacement parts in the American aftermarket through warehouse distributors (WDs) (Findings 87, 96–98). Borg-Warner sells automotive replace-

[20] The relevant products are ignition parts, wire and cable, and carburetor kits.

ment parts, including ignition parts, carburetor kits and wire and cable to so-called domestic or traditional WDs who resell to jobbers, who, in turn, resell either to garages or the consumer (Findings 62, 87). Borg-Warner had a full line of parts in the relevant products for application to domestically produced cars and a short line of parts for applications to imported or foreign made cars (Findings 85, 102). Bosch U.S. sells a full line of automotive parts for import car applications in the relevant product lines also to WDs (Finding 92). The thirty percent of Bosch U.S.'s WD customers, who account for 70 percent of its WD business, are specialists in import parts who do not resell parts for domestic applications (Findings 90, 97–98). On the other hand, 70 percent of Bosch U.S.'s customers are WDs in the domestic or "traditional" category who also sell import car parts. These domestic WDs accounted for approximately 30 percent or some $10 million of Bosch U.S.'s WD business in 1978 (Findings 90, 97–98). Borg-Warner sells to WDs in the same classification. Both respondents, moreover, are members of AWDA, a trade association of domestic WDs (Findings 73, 87, 96).[21] Bosch U.S. considers [44] membership in AWDA a means of securing new WD customers (Finding 73).

Borg-Warner began selling parts for import car applications as a result of "popular demand" from its domestic WD customers and offers them fast moving parts for popular import models in the relevant product lines (Finding 86). Bosch U.S., which has a full line for import car applications, also covers the fast moving parts for popular import car models (CX 17; Findings 82, 93, 112). Certain parts in the ignition lines of both Bosch U.S. and Borg-Warner may be used for the same applications in specific import car models (*E.g.,* Finding 111). Borg-Warner has wire and cable for a wide variety of foreign cars (Findings 136–37). In the case of the carburetor kit line, these products are produced by Borg-Warner under private label for Bosch U.S. and the coverage of both respondents is clearly comparable (Finding 124).

Borg-Warner in its catalogues expressly refers to its import car parts and both Borg-Warner and Bosch advertise their import car parts in trade magazines read by the entire industry including domestic WDs (CX 3; Findings 95, 112, 119–21, 136–37).

Respondents' primary contention is that complaint counsel has failed to show that the automotive parts lines of Borg-Warner and Bosch U.S. are substitutable, and if they are not, competition between them is impossible. The record does not show instances where the Borg-Warner line has been substituted for the Bosch line or visa versa

[21] Borg-Warner is listed in the 1979 AWDA directory, among other products, as a supplier of ignition parts, wire, cable, and carburetor kits. Bosch U.S. is listed in the same directory as a supplier, among other products, of ignition equipment for passenger cars and trucks (CX 85 p. 99). Bosch U.S.'s Master Catalogue lists ignition parts such as points, condensers, etc. together with ignition cable sets and carburetor tune-up kits (*See, e.g.,* CX 17Z–11).

(Finding 71). WDs do not buy automotive parts as such, they buy, the record shows, "lines" of parts. However, a WD may buy a short line or a full line. A supplier of a short line of fast moving parts can compete against a supplier with a full line. WDs do not necessarily buy a full line but have the option of purchasing short lines of fast moving parts. Domestic WDs selling parts for application to domestic cars and parts for application to imported cars have the choice of buying a fast moving line of import car parts for at least the more popular models from either Borg-Warner or Bosch U.S. (Findings 66, 77, 88, 132 n. 12).

The entire Bosch U.S. line would not be substitutable for the entire Borg-Warner line. Borg-Warner sells extensive lines of parts for domestic applications while Bosch U.S.'s automotive parts lines are, as a practical matter, limited to parts for [45] import car applications. This, however, does not resolve the point as respondents contend. As already noted, WDs do not necessarily buy all of the parts in a line; they can, if they so desire, concentrate on lines of fast moving parts for which they have a demand in their business. In this connection, the record shows that domestic WDs who sell import parts do have a choice of buying a line of fast moving parts in the relevant products for import car applications in the more popular car models from either Bosch U.S. or Borg-Warner. No additional evidence of competition is needed.

Respondents urge that analysis of the record on the basis of substitutability, product characteristics, patent or technology barriers, distinct supplier groups, distinct customers, different channels of distribution, separate marketing efforts and industry recognition, demonstrates that complaint counsel have failed to carry their burden of proof on the issue of competition as spelled out in *Brown Shoe Company* v. *United States,* 370 U.S. 294 (1962) and other relevant Section 7 precedents (RB 5–10).

Respondents' analysis is designed to show that Borg-Warner and Bosch U.S. sell in different markets. Bosch U.S., it is true, sells to WDs specializing in parts for import car applications to whom Borg-Warner does not sell. In defining a submarket of import car parts distributed through import car specialists, it may be significant that some Borg-Warner and Bosch U.S. parts, although they may be used for the same applications, have different physical characteristics; in that context it may also be significant that Bosch U.S. parts frequently are original equipment parts or meet such specifications, and that there is a preference for such parts among import specialists. For the purpose of defining a submarket, it may also be relevant that certain advertising is focused on one part of the overall market and not on others.

The existence of a separate submarket for sale of import car parts to WD import specialists is assumed for the sake of argument. But such a submarket, even if it exists, does not negate the fact that Bosch and Borg-Warner overlap in the sale or offering for sale to domestic WDs of the relevant products for popular import car applications and that domestic WDs have the choice of purchasing from Bosch U.S. or Borg-Warner in this area. This central fact outweighs testimony that Borg-Warner and Bosch U.S. did not perceive each other as competitors (*E.g.,* Reichers 646, 647–50; Wagner 1251).[22] **[46]**

In resolving the competition issue it is appropriate by way of "analogy" to draw on concepts applied under Section 7 of the Clayton Act. However, such criteria are not to be used "'to obscure competition but to recognize competition where in fact competition exists.'" *TRW Inc.,* 93 F.T.C. 325, 380 (1975) citing *United States* v. *Continental Can Co.,* 378 U.S. 441, 453 (1964). The kind of product market definition called for in a merger or monopolization case is not relevant to a Section 8 proceeding. *See Protectoseal Co.* v. *Barancik,* 484 F.2d 585, 589 (7th Cir. 1973). Analysis of the level of competition in specific submarkets is appropriate under Section 7, where the focus is not merely on the existence of competition, but also on the impact on competition of the challenged mergers. Since there is no competitive effects test under Section 8, there is no need for a precise definition of the metes and bounds of the relevant market under that statute.

In a Section 8 proceeding the focus of analysis is on the existence of competition between the two firms involved in the interlock. The fact that one firm may compete in a submarket in which the other does not compete cannot vitiate evidence of competition between the two firms with respect to a substantial group of customers outside that submarket. The existence of different submarkets for the relevant product lines has no relevance to a Section 8 proceeding where the two interlocked firms offered a choice for a substantial group of customers in the overall market. It is the ability of customers to choose between different suppliers which is the essence of competition. *See United States* v. *El Paso Gas Co.,* 376 U.S. 651, 661 (1964). Applying that test, Borg-Warner and Bosch U.S. competed in the sale of automotive replacement parts within the meaning of the statute.

2. The De Minimis Issue

Respondents also argue that even if competition has been shown by the record that the case should be dismissed because such competition is at best de minimis. The record does not permit quantification with any degree of precision as to the overlap in the sale of import car parts

[22] Nor, under the circumstances, can the finding on this point be overcome by the characterization by a WD, who carries both, of the Bosch U.S. and Borg-Warner lines as complementary (Finding 77).

in the relevant product lines to domestic WDs by Borg-Warner and Bosch U.S. The question therefore arises whether de minimis is properly a [47] defense in a Section 8 proceeding once competition has been established. Precedent may be found to support either position. *Compare Paramount Pictures Corp.* v. *Baldwin-Montrose Chemical Co.*, 1966 Trade Cases ¶ 71,678 (S.D.N.Y. 1966) with *United States* v. *Sears, Roebuck & Co.*, 111 F.Supp. 614 (S.D.N.Y. 1953) and *United States* v. *Crocker National Corp.*, 422 F.Supp. 686 (N.D. Ca. 1976).

The starting part of the analysis is that Section 8 is a statute designed to prevent incipient antitrust violations by removing the opportunity or temptation for such violations through interlocking directorates. *Crocker National Corp.*, 422 F.Supp. at 703; *Sears, Roebuck & Co.*, 111 F.Supp. at 616. To achieve that objective Congress sought to avoid questions as to whether the competition which the interlocking directorates could potentially restrain was substantial or de minimis. *Crocker National Corp.*, 422 F.Supp. at 703. Buttressing this conclusion is the fact that the statute already contains a substantiality requirement specifying that at least one of the corporations must have capital, surplus and undivided profits aggregating more than $1 million.[23] Considering the fact that the statute already contains a substantiality requirement, separate and apart from competitive overlap, and the further fact that Section 8 is an incipiency statute, it follows that de minimis is not a defense once competition between the interlocked firms has been established.

This conclusion is further reinforced by the so-called "so that" clause of the statute: [48]

> [N]o person at the same time shall be a director in any two or more corporations. . . . if such corporations are or shall have been theretofore . . . competitors, *so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.* . . . [emphasis added].

The "so that" clause encompasses price fixing agreements which are *per se* illegal irrespective of the amount of commerce involved.[24] Re-

[23] . . . The vital distinction between § 7 and § 8, however, is that the latter omits the § 7 test and promulgates its own substantiality standard in the form of the one million dollar size requirement. The omission of "substantially to lessen competition, or to tend to create a monopoly" from § 8 in contradistinction to its inclusion in § 7 and other sections of the same Act may not be deemed inadvertent. Were the defendants' construction to be adopted, it would require the application under § 8 of a test which Congress appears deliberately to have omitted. *Sears, Roebuck & Co.*, 111 F.Supp. at 619.

[24] *See* Kramer "Interlocking Directors and the Clayton Act After 35 Years," 59 Yale L.J. 1266, 1269 (1950). As the court held in *Crocker National Corp.*, 422 F.Supp. at 703:

> An examination of the relevant statutory language set forth above reveals that *the "so that" clause does not purport on its face to be, and is in fact not, a definition of the term competitors.* Moreover, were that clause to be interpreted as defining the term "competitors", it would lead to the analogous result of declaring companies with vertical relationships, such as manufacturers and distributors, to be competitors.
>
> The real purpose of the "so that" clause seems to have been the establishment of a *per se* rule that interlocking directorates among competing corporations (that otherwise meet the requirements of the fourth paragraph of Section 8) are illegal. . . . [emphasis added].

spondents contention on the de minimis defense must be rejected on that score alone.

Respondents cite two consent orders issued pursuant to Section 8 in support of their de minimis argument. *Kraftco Corp.*, 88 F.T.C. 362 (1976) and *IBM Corp.*, 89 F.T.C. 91 (1977). In *Kraftco,* directors were required to list only those potential interlocks exceeding $1 million per year. The *IBM* order covers only those situations in which the competitive products and services are "in excess of either one-half of one percent (.5%) of [a] company's most recent annual gross revenues or $5,000,000, [49] whichever is the lesser." Exclusions of this nature are apparently designed to eliminate de minimis situations from the coverage of such orders (*See* staff memorandum dated Feb. 3, 1975 attached as Appendix A to Respondent's Joint Brief).

The consent orders are not controlling, for "the circumstances surrounding such negotiated agreements are so different that they cannot be persuasively cited in a litigation context." *United States* v. *du Pont & Co.*, 366 U.S. 316, 330 n. 12 (1961). At best, these orders appear to be an administrative decision on part of the Commission as to how to allocate its resources in this area. They do not evidence an attempt by the Commission to construe the scope of Section 8 in relation to the de minimis issue. In short, these provisions in *IBM Corp.* and *Kraftco* appear to be no more than exercise of the Commission's discretion in determining when it would be in the public interest to enforce the orders in question. Administrative law judges, however, are not empowered to dismiss complaints where to do so would infringe on the Commission's exercise of administrative discretion. *Compare* the Commission's "order affirming the initial decision of the Administrative Law Judge granting complaint counsel's motion for dismissal" *Century 21 Commodore Plaza Inc.*, (95 F.T.C. 808, June 9, 1980). This argument is more properly addressed to the Commission.

3. Hydraulic Products

The record does not sustain a finding that Borg-Warner competed with Bosch GmbH or Bosch U.S. in the sale of hydraulic products.

The salient facts are as follows: Borg-Warner and Bosch GmbH-Bosch U.S. in the relevant period[25] produced and marketed hydraulic gear pumps, motors, and valves (Findings 172, 185). Borg-Warner sold its hydraulic products exclusively in the mobile sector of the hydraulics market. Bosch U.S., on the other hand, sold such products primarily to the industrial sector, making possibly 40 percent of its sales to the mobile part of the market (Findings 177, 188–91, 204). Borg-Warner hydraulic valves, pumps, and motors perform the same functions as Bosch valves, pumps and motors. However, physically,

[25] Borg-Warner sold off its hydraulics business in July '79 (Finding 179).

they are different in terms of their dimensions, mountings and the fact that the Borg-Warner parts have fittings in inches while those of Bosch are generally metric. The performance characteristics [50] of Bosch's and Borg-Warner's products also differ significantly. The Borg-Warner valves and pumps are designed to be installed in low pressure/high volume systems while the Bosch products are designed for high pressure/low volume use; high pressure components moreover are more expensive. Because of such physical differences and varying performance characteristics the Bosch components are not interchangeable with Borg-Warner hydraulic parts (Findings 195–200).

Most mobile original equipment manufacturers (OEMs) design their own hydraulic system. A low pressure hydraulic system can be designed to perform the same function as a high pressure design system. To that extent, it is conceivable that Bosch U.S. and Borg-Warner could compete for sales of hydraulic parts to OEMs in the mobile hydraulics market at the design or specifications stage (Findings 166, 170, 201). The record, however, contains no concrete instances of competition between respondents at the design or specification stage for any particular customer. There is no way of determining from the record the circumstances under which a domestic OEM, ordinarily oriented to low pressure systems, would design a system to incorporate Bosch's high pressure parts (Finding 209).[26] Accordingly, a finding that Bosch U.S. and Borg-Warner competed in the sale of hydraulic parts to the mobile sector of the hydraulics market at the design or specifications stage would be conjectural.[27]

In Europe, Borg-Warner's hydraulic sales were essentially confined to sales of U.S. design (low pressure) hydraulic [51] products to production facilities of U.S. companies overseas (Findings 178, 212). Bosch apparently also made sales of "hydraulic components" to U.S. OEMs manufacturing mobile equipment in Europe which was imported into the United States. The record is unclear as to the precise nature of the components sold (Finding 192). In any event, as in the case of the U.S. sales, there is insufficient information that Bosch and Borg-Warner competed in the design or specification stage for such business (*See* Finding 209). The evidence does not permit a determina-

[26] In *TRW*, 93 F.T.C. at 380 *et seq.*, the Commission, in resolving the competition issue on analogous facts, had before it concrete instances of how product differences could be overcome in order to compete for the business of specific competitors.

[27] There is evidence that both Borg-Warner and Bosch U.S.-Bosch GmbH sold hydraulic products to Massey-Ferguson (Findings 190, 206). However, as far as can be determined from this record, the Bosch products purchased by Massey-Ferguson were not offered by Borg-Warner.

Similarly, it appears Bosch U.S. and Borg-Warner both made sales to Fauver Company, a distributor. However, the record shows that Bosch's sales to distributors were of products such as accumulators not offered by Borg-Warner or industrial valves or gear pumps (Findings 189, 193). Borg-Warner, on the other hand, sold valves or gear pumps to distributors for replacement parts for original mobile equipment (Finding 177). Borg-Warner made no effort to serve the industrial segment of the hydraulics market through distributors (Trauscht 1155).

tion of whether Bosch GmbH competed with Borg-Warner for such business overseas.

Complaint counsel, in urging that competition between respondents in the hydraulics market has been proven, rely heavily on documents, generally from the period 1976–78, originally from respondents' files. These indicate that the gear pump lines of Bosch and Borg-Warner are similar and that in mobile equipment valves their lines conflict (CX 36A, C); that there is a "direct confrontation" in a certain section of the production programs of the two companies in "part of the gear pump range" (CX 37A-B); and that the Borg-Warner gear pump range and the Bosch range in the case of certain gear pumps" are very similar" (CX 74J). Certain Borg-Warner memoranda list Bosch as a foreign or European competitor in hydraulic valves and pumps or simply as a competitor (CX 76F, J, 77P *in camera;* 80C, H-I). Other documents pertain to the possibility or discussion of cooperation in the hydraulics market (*E.g.,* CX 44A-B, *in camera,* 66D).

Contrary to respondents' contentions, the documents are admissible under *Lenox, Inc.,* 73 F.T.C. 578 (1968), *aff'd in part and modified in part on other grounds,* 417 F.2d 126 (2nd Cir. 1969). Contemporaneous documents from a party's files as a general rule are entitled to considerable weight. However, the fact that the documents are admissible under *Lenox* does not mean that all statements or expressions of opinion contained therein are necessarily conclusive. Where there is a conflict such evidence must be weighed like any other. Here, the opinions and statements indicating that Bosch competed with Borg-Warner require further explanation, in light of the evidence adduced by respondents, so that their basis can be determined. It is difficult to determine, without testimony from the authors of such documents, how much weight they gave to other facts of record which might lead to a contrary conclusion such as significant differences involving the physical and performance characteristics of the Bosch and Borg-Warner products.

The case presents an unresolved issue as to whether Borg-Warner competed with Bosch GmbH and Bosch U.S. in the sale of hydraulic products to mobile equipment OEMs at the design or specification stage. Prerequisite to a definitive resolution of this question would be the testimony of such OEMs as to the [52] relevant considerations in determining at the design stage whether to utilize a high pressure or low pressure system as well as the testimony of the former respondent officials who wrote documents such as CX 36, 37, etc.[28]

[28] Clearly, a decision in designing mobile equipment on whether to install or design a low pressure or high pressure hydraulic system involves considerations which are more complex and sophisticated than those involved in determining whether to install a "universal" or a "custom" ignition set as a replacement part in an automobile.

4. Automotive Air Conditioning Compressors

Neither Bosch GmbH nor Bosch U.S. sell automotive air conditioning compressors in the United States. Femsa, Inc., which does make such sales, is a subsidiary of Fabrica Espanola Maguetos (Femsa-Madrid). Femsa-Madrid is in turn owned 17 percent by Bosch GmbH and 34 percent by Bosch Internationale in which Bosch GmbH holds a controlling interest. The record which shows no contacts between Bosch GmbH and Femsa, Inc.[29] will not support a finding that Bosch GmbH either controls or has the power to control Femsa, Inc. (Findings 214–26). Accordingly, no finding is made that Bosch GmbH competes with Borg-Warner or is engaged in commerce by virtue of Femsa, Inc.'s operations.

5. The Indirect Interlock And Commerce Issues

Respondents assert that Section 8 of the Clayton Act prohibits only "direct" interlocks between corporations which are themselves in direct competition, and that competition between the interlocked firms cannot be found on the basis of a parent subsidiary relationship. Respondents therefore urge that the charges based on the positions of Dr. Merkle and Dr. Bacher with Bosch GmbH cannot be sustained. The contention is rejected.

The Second Circuit in *Kennecott Copper Corp.* v. *Curtiss-Wright Corp.*, 584 F.2d 1195, 1205 (2nd Cir. 1978), on which respondents rely, held that there is no general rule under Section 8 prohibiting interlocks between parent companies whose subsidiaries compete. The court left open, however, the question of application of the Act to situations where the parent company closely controls and dictates the policies of its subsidiary. **[53]**

The authorities conflict but *see* Kramer, "Interlocking Directorships and the Clayton Act After 35 Years," 59 Yale L.J. *supra* at 1268 n. 11:

> . . . [w]here the major policies of the subsidiaries are dictated by the parents, it would seem there is a strong case for holding the directorships unlawful. . . .

Cited in *United States* v. *Cleveland Trust Company,* 392 F.Supp. 699, 712 (N.D. Ohio 1974).

To achieve the statutory objective of preventing incipient antitrust violations by removing the opportunity or temptation for such acts, it is clearly necessary to prevent indirect interlocks at least in those situations where the parent controls or has the power to control its subsidiary's major business decisions. The determination of whether

[29] The record shows that two of Femsa-Madrid's directors also sit on the board of Bosch GmbH.

sufficient control exists is to be decided on a case by case basis. *See Cleveland Trust Co.* The evidence as to parent subsidiary control and contacts relevant to the indirect interlock issue is also dispositive of the commerce issue. This evidence will be considered below in connection with both questions.

Bosch GmbH and the individual respondents urge that Bosch GmbH is not "engaged in whole or in part in commerce" within the meaning of Section 8 of the Clayton Act. This argument is interrelated with respondents' contention that the interlocked corporations must be in direct competition, a requirement which they assert is not met by an indirect interlock, involving a subsidiary corporation.

It is undisputed that Bosch U.S. is engaged in commerce within the meaning of Section 8. The question of whether Bosch GmbH is engaged in commerce by virtue of the business and operations of its subsidiary Bosch U.S. is therefore squarely presented. There is no dispute that the criteria for determining whether a corporation is engaged in commerce are the same for Sections 7 and 8 of the Clayton Act.

Relying primarily on *United States* v. *American Building Maintenance Industries,* 422 U.S. 271 (1975), respondents urge Bosch GmbH is not "directly" engaged in the sale, distribution or acquisition of goods in United States commerce and therefore is not engaged in commerce within the meaning of the Clayton Act. This construction of American Building Maintenance has, previously been rejected. [54]

. . . Respondents rather crabbed interpretation of the Court's language in *American Building,* that "a corporation must itself be directly engaged . . . in interstate commerce," finds no support in that decision. Nowhere in that case is there the slightest hint that a corporation operating through its subsidiaries, which in turn are admittedly involved in interstate commerce falls outside the reach of Section 7 because it is not deemed to be "engaged in commerce." *Jim Walter Corp.,* 90 F.T.C. at 671, 740 (1977).

Dispositive of the question are two decisions under Section 7 holding that where the requisite degree of control exists, a parent may be found to be engaged in commerce by virtue of a subsidiary's operations. *Jim Walter Corp.,* 90 F.T.C. 671 (1977); *United States* v. *Jos. Schlitz Brewing Company,* 253 F.Supp. 129 (N.D. Cal. 1966), *aff'd,* 385 U.S. 37 (1966), *reh. denied,* 385 U.S. 1021 (1967).

Strict adherence to common law principles is not required in determining whether a parent should be held for the acts of its subsidiary, where the public interest is involved in the enforcement of the Federal Trade Commission or Clayton Acts. *Jim Walter Corp.,* 90 F.T.C. at 735. Nor is overt intervention in the day-to-day activities of the subsidiary prerequisite to finding the parent company responsible for the acts of the former:

Historical ties and associations, combined with strategic holdings of stock, can on occasion serve as a potent substitute for the more obvious modes of control . . . Domination may spring as readily from subtle or unexercised power as from arbitrary imposition of command. To conclude otherwise is to ignore the realities of intercorporate relationships. *North American Co.* v. *SEC,* 327 U.S. 686, 693.

Latent control alone is sufficient to hold the parent liable for its subsidiary's acts. *Beneficial Corp.,* 86 F.T.C. 119, 159 (1975), *rev'd in part on other grounds,* 542 F.2d 611 (3rd Cir. 1976). *See also USLIFE Credit Corp.,* 91 F.T.C. 984, 1034 (1978).

Bosch GmbH directly and indirectly wholly owns Bosch U.S.; Bosch GmbH and its subsidiaries, in which Bosch GmbH holds a controlling interest, nominate and elect the directors of Bosch [55] U.S. (Findings 35–36); there is an overlap between parent and subsidiary in the case of four out of twelve of Bosch U.S.'s directors (Finding 37). There is also an overlap in the officers and directors of Bosch U.S. and Robert Bosch North America Inc., a Bosch GmbH subsidiary which functions as a holding company for its parent (Findings 35, 38–39). Approximately 100 of Bosch U.S.'s 1,500 employees are former employees of Bosch GmbH; Bosch U.S. hires employees of its parent when the necessary skills are not available in the United States (Finding 41). Three of Bosch U.S.'s corporate officers were formerly employees of Bosch GmbH or other Bosch affiliates (Findings 42–45). Five of the 15 employees of Robert Bosch North America are simultaneously employed by Bosch U.S. and the office space of Robert Bosch North America is a "contiguous part of the overall [Bosch U.S.] real estate" (Finding 45). Bosch U.S.'s current president was employed in 1973 as a consultant by Bosch GmbH for North American activities to evaluate business opportunities, to become involved in licensing opportunities, potential new business ventures "and also to collaborate with the existing corporation Robert Bosch Corporation [Bosch U.S.]." He assumed his position as president of Bosch U.S. in 1974 (Finding 40). Bosch GmbH established the subsidiary to market its products in the United States; Bosch U.S. sells the relevant products under the Bosch trademark; Bosch U.S. is the only U.S. firm licensed to use its parent's trademarks (Finding 55); Bosch U.S. discusses with Bosch GmbH what products should be introduced in the subsidiary's market, although on occasion the subsidiary has rejected the parent's suggestion for the introduction of certain products (Finding 48); Bosch GmbH has made capital contributions to the business of Bosch U.S. to pay for facilities in order to start new programs; Bosch GmbH has communicated with the subsidiary concerning major proposed expenditures (Findings 53–54); Bosch U.S. submits financial reports, forecasts, operating results, balance sheets and business plans to Bosch GmbH (Finding 46); in hydaulics sales to a major customer the

parent and subsidiary collaborated on engineering and specification requirements, such collaboration being "tied into again [the] Bosch relationship worldwide with Massey-Ferguson, trying to achieve uniform application and interchangeability" (Finding 56); Borg-Warner officials had a business discussion with a Bosch GmbH official in charge of the automotive aftermarket outside of Europe talking "in particular about Bosch's aftermarket activities in the United States" (Finding 57); Bosch U.S. is responsible for warranty service on automotive equipment in the United States, with respect to which Bosch GmbH represents that it has a worldwide "Service Network", and the parent company handles such matters in close cooperation with those responsible in countries other than Germany (Finding 59); Bosch GmbH officials suggested to Borg-Warner discussion of a "joint action plan" concerning the hydraulics market in the [**56**] United States[30] and other areas (Finding 60). Other discussions or contemplated discussions concerning cooperation between Bosch GmbH and Borg-Warner also involved the business of Bosch U.S. (Finding 57).

Bosch GmbH had the power by virtue of stock ownership and interlocking directorships to control the affairs of its subsidiary; parent subsidiary discussions concerning major expenditures demonstrates the power to control the subsidiary's marketing decisions as did the facts of record showing that Bosch U.S.'s affairs were subject to coordination with the multinational business of the Bosch Group (*E.g.*, Findings 40, 56–60).

The record demonstrates the requisite degree of control by Bosch GmbH over the subsidiary so as to bring it within the purview of Section 8 of the Clayton Act. Bosch GmbH had the power, whether or not exercised, to influence or control those decisions which might involve violations of the antitrust laws. The totality of these factors is sufficient to bring this case within the rule of *Jim Walter* and *Jos. Schlitz*. Bosch GmbH by virtue of its control over and contacts with Bosch U.S. is engaged in commerce within the meaning of Section 8 of the Clayton Act. On the same basis, Bosch GmbH is found to compete with Borg-Warner in the sale of the relevant automotive replacement parts by virtue of the operations of Bosch U.S.

6. Applicability Of Section 5

If, contrary to the conclusions reached herein, indirect interlocks are not within the proscription of Section 8, they are nevertheless subject to Section 5 of the Federal Trade Commission Act. One of the objectives of Section 5 is to halt in their incipiency violations of the Sherman and Clayton Acts before such practices become full fledged violations of those statutes. As the Supreme Court held:

[30] Bosch U.S. is responsible for marketing of Bosch's hydraulic products in the United States.

. . . [t]he Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act . . . to stop in their incipiency acts and practices which, when full blown, would violate those Acts . . ., as well as to condemn as [57] "unfair methods of competition" existing violations of them. . . .

FTC v. *Motion Picture Advertising Service Co.,* 344 U.S. 392, 394 (1953). Put another way, " . . . the Commission has power under Section 5 to arrest trade restraints in their incipiency without proof that they amount to an outright violation . . . of the Clayton Act or other provisions of the antitrust laws." *FTC* v. *Brown Shoe Co.,* 384 U.S. 316, 322 (1966). Section 5, moreover, authorizes the Commission to suppress as unfair methods of competition acts counter to the public policy declared in the Sherman and Clayton Acts. *Fashion Originators' Guild* v. *FTC,* 312 U.S. 457, 463 (1941).

The Commission may exercise that power where the practices are inconsistent with the Clayton Act although not technically within one the specific prohibitions of the statute. *Grand Union Co.* v. *FTC,* 300 F.2d 92, 99 (2nd Cir. 1962). *Kraftco Corp.,* 89 F.T.C. 46, 63–64 (1977), *rev'd. on other grounds,* 565 F.2d 807 (2nd Cir. 1977); *Perpetual Federal Savings & Loan Assoc.,* 90 F.T.C. 608, 652–57 (1977), *withdrawn,* 3 Trade Reg. Rep. ¶ 21,609 (1979) [94 F.T.C. 401]. The Commission, moreover, need not prove injury to competition where it proceeds under Section 5 against acts contrary to the policy of a Section of the Clayton Act which itself is a *per se* statute. *Grand Union Co.,* 300 F.2d at 99. Accordingly, if contrary to the conclusion reached here, indirect interlocks are not within the technical confines of Section 8, then they can be reached under Section 5 to effectuate the public policy of the Clayton Act. Indirect interlocks where the parent company has the power, whether or not exercised, to influence or control those decisions of the subsidiary which might involve antitrust violations are surely counter to the policy of Section 8.

Similarly, if contrary to the conclusions reached herein, Bosch GmbH is not engaged in commerce within the meaning of the Clayton Act, the record is sufficient to bring Bosch GmbH within the standard of Section 5, namely "in or affecting commerce."

REMEDY

An order will issue prohibiting a continuation of the interlocks between Borg-Warner and Bosch GmbH and Bosch U.S. as long as these corporations or their subsidiaries compete. The order will also prohibit interlocking directorates between respondents and other corporations with whom they compete. However, in the case of Bosch GmbH and Bosch U.S., a limitation of the provision to prohibitions on

interlocks with competing corporations engaged in commerce "within the United States" is warranted. [58]

Complaint counsel also seek a prohibition barring any director, officer, or employee with management functions or any representative of Bosch GmbH or any of its subsidiaries from serving on the board of directors of Borg-Warner. Complaint counsel urge that such a provision is necessary to make the order effective. Such a provision will not issue. The violation found is a narrow one. The government's case, relying on the *per se* nature of Section 8, is limited to a showing that the elements of the statute have been met. The record does not permit an evaluation of the competitive effects of the arrangements. Under the circumstances, the evidence justifies no more than a ban on interlocking directorates. *See TRW, Inc.*, 93 F.T.C. at 387.

The presence of Dr. Merkle and Dr. Bacher on the boards of Borg-Warner, Bosch GmbH, and Bosch U.S. also constitutes a violation of Section 5 of the Federal Trade Commission Act. A broader order is not warranted for that reason since the instant Section 5 case is based simply on the Section 8 violation or a showing that the practices complained of violate the policy of that statute if all the technical elements of the Section 8 provision have not been demonstrated. To justify a broader order under Section 5, it would be necessary to demonstrate that respondents had committed unfair acts and practices going beyond a violation of Section 8 or the spirit of that Act. No such finding can be made on this narrowly based record.[31]

Nor is such a provision warranted by the fact that Bosch GmbH and Borg-Warner in connection with Bosch's stock acquisition of the latter's stock had engaged in extensive discussions for future cooperation or joint activities which might benefit both corporations. The Commission had two alternatives in addition to the course followed in this proceeding. It could have charged the stock acquisition as illegal under Section 7 of the Clayton Act and/or it could have charged that such discussions arising out of or related to the stock acquisition were unfair methods of competition. Such a course under either statute would have required some evidence of the impact or probable impact on competition of the stock acquisition or such discussions. The case was not tried on that [59] basis. Accordingly, there is no justification on that score for prohibitions going beyond a ban on interlocking directorates as provided in Section 8 of the Clayton Act.

[31] *Central Linen Service Company*, 64 F.T.C. 1307, 1349, 1356 (1964) did issue an order containing a provision such as the one which complaint counsel request. However, it should be noted that in that Section 5 proceeding, the complaint alleged and the record showed a conspiracy to allocate customers. No such evidence is contained in this record.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and the respondents.

2. The complaint herein states a cause of action and the proceeding is in the public interest.

3. The interlocking directorates between Bosch GmbH and Borg-Warner and Bosch U.S. and Borg-Warner violate Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

ORDER

The following definitions shall apply in this order:

Subsidiary of a corporation means any other corporation of which 50 percent or more of the voting stock is owned or controlled, directly or indirectly, by such corporation.

Parent of a corporation means any other corporation which owns or controls 50 percent or more of the voting stock, directly or indirectly, of such corporation.

Sister of a corporation means any subsidiary of the parent of such corporation.

I.

It is ordered, That respondents Hans L. Merkle and Hans Bacher shall forthwith cease and desist from serving on the board of directors of Borg-Warner or on the board of management and boards of directors of Bosch GmbH and all of its subsidiaries and shall forthwith withdraw from participation in the direction, control or conduct of the business of the corporation(s) from which each resigns. **[60]**

II.

It is further ordered, That respondent Borg-Warner and its successors and assigns shall forthwith cease and desist from having, and in the future shall not have, on their boards of directors any individual who either:

(a) serves at the same time on the board of management and/or boards of directors of Bosch GmbH or any of its subsidiaries, so long as Borg-Warner competes with Bosch GmbH or any of its subsidiaries in the production or sale of any product or service; or

(b) serves at the same time on the board of directors of any other corporation (other than a subsidiary, parent or sister of Borg-Warner)

which competes with Borg-Warner in the production or sale of any product or service; or

(c) fails to submit to Borg-Warner any statement required by Paragraph IV of this order to be obtained by Borg-Warner.

III.

It is further ordered, That respondents Bosch GmbH and Bosch U.S. and their successors and assigns shall forthwith cease and desist from having, and in the future shall not have, on their boards of management and boards of directors any individual who either:

(a) serves at the same time on the board of directors of Borg-Warner so long as Bosch GmbH or Bosch U.S. or any of their subsidiaries or parent corporations compete with Borg-Warner in the production or sale of any product or service; or

(b) serves at the same time on the board of directors of any other corporation engaged in commerce within the United States (other than a subsidiary, parent or sister of Bosch GmbH or Bosch U.S.) which competes with Bosch GmbH or [61] Bosch U.S. or any of their subsidiaries or parent corporations; or

(c) fails to submit to Bosch GmbH or Bosch U.S. any statement required by Paragraph IV of this order to be obtained by Bosch GmbH or Bosch U.S.

IV.

It is further ordered, That within thirty (30) days of the effective date of this order, and prior to each election of directors or prior to the solicitation of proxies for such election, whichever is earlier, respondents Borg-Warner, Bosch GmbH, and Bosch U.S. shall obtain a written, certified statement from each member of their board of directors or board of management (except directors whose terms expire at the next election and who are not standing for re-election) and from each nominee for a directorship or seat on the board of management (who is not then a director) showing:

(a) the name and home mailing address of each director or nominee; and

(b) the name and principal office mailing address of, and a listing of each product or service produced or sold by, each corporation which the director or nominee then serves as a director at the time of the statement.

Provided, however, That in complying with the provisions of Paragraph IV(b), the information to be furnished by Bosch GmbH concern-

ing its directors may be limited to those corporations engaged in commerce within the United States and those products and services sold or offered for sale by such corporations within the United States.

The requirements of this paragraph shall not apply to elections of directors occurring after ten (10) years from the effective date of this order.

Nothing in this paragraph shall be construed to relieve respondents of their obligations under Paragraphs II(a) and III(a) above due to any error or omission contained in any written statement received pursuant to this paragraph. [62]

V.

It is further ordered, That within forty-five (45) days of the effective date of this order, and annually for a period of ten (10) years thereafter, respondents Borg-Warner, Bosch GmbH and Bosch U.S. shall file with the Commission separate, written reports setting forth in detail the manner and form in which each has complied with this order. Copies of the statements obtained pursuant to Paragraph IV of this order shall be submitted to the Commission as part of the reports of compliance required by this paragraph.

Nothing in this paragraph shall relieve respondents Borg-Warner, Bosch GmbH and Bosch U.S. of their obligations to comply with Paragraphs II, III, and VI of this order once they are no longer required to submit reports of compliance to the Commission.

VI.

It is further ordered, That respondents Borg-Warner, Bosch GmbH and Bosch U.S. shall notify the Commission at least thirty (30) days prior to any change in the corporations or in their relationships to each other such as dissolution, assignment, or sale resulting in the emergence of successor corporations, the creation or dissolution of subsidiaries, or any other change in the corporations which may affect compliance obligations arising out of this order.

APPENDIX A

Abbreviations Used

Ans. Par. – Paragraph of the Answer
Comp. Par. – Paragraph of the Complaint
RA – Response to Request For Admissions
Int. – Response to Interrogatories
RB – Respondents Joint Brief

CX - Commission Exhibits
Tr. - Transcript
BWX - Borg-Warner Exhibits
RBUSX - Bosch U.S. Exhibits
RBGX - Bosch GmbH Exhibits

OPINION OF THE COMMISSION

BY BAILEY, *Commissioner:*

The Commission issued a complaint on November 7, 1978, charging three corporations and two individuals with violating Section 8 of the Clayton Act, 15 U.S.C. 19, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The complaint alleged interlocking directorates between competing corporations.

The respondents in this proceeding are Borg-Warner Corporation, a Delaware corporation with its principal office in Chicago, Illinois; Robert Bosch GmbH ("Bosch GmbH"), a limited liability company organized under the laws of the Federal Republic of Germany; Robert Bosch Corporation ("Bosch U.S."), a New York corporation with its principal office in Broadview, Illinois, and a wholly owned Bosch GmbH subsidiary; and Dr. Hans L. Merkle and Dr. Hans Bacher, residents of the Federal Republic of Germany and the directors in question. The complaint alleged that Borg-Warner competed with Bosch U.S. in the sale of automotive ignition parts, wire and cable, carburetors, carburetor kits, automotive test equipment, automotive air [2] conditioner compressors, hydraulic valves, and hydraulic gear pumps and motors, and that the presence of Messrs. Merkle and Bacher on the boards of Borg-Warner and Bosch U.S. was thus a violation of Section 8. The complaint also alleged that Bosch GmbH was similarly a competitor of Borg-Warner; complaint counsel argued at trial that although Bosch GmbH itself made no sales in competition with Borg-Warner, the degree of control exercised by Bosch GmbH over Bosch U.S. warranted imputing the subsidiary's sales to the parent corporation for purposes of Section 8 and finding that the presence of these two directors on the boards of both Borg-Warner and Bosch GmbH was an unlawful interlock as well.[1]

In an initial decision filed June 30, 1980, Administrative Law Judge ("ALJ") Theodor P. von Brand found that Borg-Warner competed with Bosch U.S. and Bosch GmbH in the United States in the sale of "fast-moving" automotive ignition parts, wire and cable products, and carburetor tune-up kits with application on imported cars. All re-

[1] After the trial, respondents notified the ALJ that Messrs. Bacher and Merkle were no longer serving on the board of Bosch U.S. *See* Letter from Joseph A. McManus, Esq., to ALJ von Brand, *ex parte*, Feb. 4, 1980. Thus, only the interlock between Borg-Warner and Bosch GmbH continued after that date.

spondents, therefore, were found in violation of Section 8 of the Clayton Act and Section 5 of the FTC Act. The complaint was dismissed with respect to allegations that respondent corporations competed in hydraulic products and automotive air conditioner compressors. The ALJ entered an order requiring Messrs. Merkle and Bacher to remove themselves from either the board of Borg-Warner or the boards of both Bosch U.S. and Bosch GmbH. The order barred interlocking directorates between Borg-Warner and either of the two Bosch entities in any product lines in perpetuity, with strict and long-lasting (ten-year) reporting requirements. Both sides have filed appeals. Subsequent to the argument of this matter on appeal, counsel for Hans Bacher notified the Commission of Dr. Bacher's death.

I. BACKGROUND

A. *The Automotive Parts Aftermarkets*

Complaint counsel alleged that Borg-Warner and Bosch U.S. competed in the aftermarket for certain foreign-car parts. The aftermarket is the market for replacement parts, that is, parts intended for ultimate use in automotive repairs (*see* I.D. 43; [3] I.D.F. 62–98).[2] According to the record in this case, distribution in the aftermarket takes place at three levels. Suppliers such as Borg-Warner and Bosch U.S. sell lines of parts to warehouse distributors ("WD's"), who are authorized by the suppliers to resell one or more lines as intermediate wholesalers. WD's maintain inventories of vehicle parts for resale to local "jobbers," and in exchange for this service suppliers grant WD's a discount from the jobber price. Jobbers serve as wholesalers to retail outlets such as garages and service stations, and sometimes jobbers make retail sales to consumers (I.D.F. 62).

[2] The following abbreviations will be used in this opinion:

I.D.	– Initial Decision Page Number
I.D.F.	– Initial Decision Finding Number
Tr.	– Transcript Page Number, followed by witness' name
Int. No.	– Response to Interrogatory Number, preceded by responding party's name
RA	– Response to Request for Admission Number, preceded by responding party's name
CX	– Complaint Counsel's Exhibit Number
CPF	– Complaint Counsel's Proposed Finding
CAB	– Complaint Counsel's Appeal Brief
CAAB	– Complaint Counsel's Appellate Answering Brief
CARB	– Complaint Counsel's Appellate Reply Brief
BWX	– Borg-Warner Exhibit Number
RBUSX	– Bosch U.S. Exhibit Number
RPF	– Respondents' Proposed Findings
RB	– Respondents' Joint Brief, Apr. 1, 1980
RAB	– Respondents' Joint Appeal Brief
RAIB	– Respondents Bosch GmbH, Merkle & Bacher's Brief on Indirect Interlocks
RAAB	– Respondents' Joint Appellate Answering Brief
RARB	– Respondents' Joint Appellate Reply Brief
RACB	– Respondents' Joint Appellate Reply Brief on the Competition Issue
RMD	– Respondents' Motion to Dismiss, Dec. 14, 1981.

Suppliers do not sell individual parts to WD's but sell groups of related items known as "lines" of parts. Among these are lines of ignition parts, wire and cable products, and carburetor kits (*see* Tr., Reichers 622–23; I.D.F. 62–63). A line of parts is defined in the industry as the parts "necessary to supply and complete the function of a specific phase of operation within the vehicle" (*id.*). No manufacturer, however, produces a line containing every single part with application on all foreign-made vehicles or on all domestically produced vehicles (Tr., Nelson 498–99; I.D.F. 67). Indeed, manufacturers generally offer either a "full line" of parts, which has all parts in the relevant category necessary to repair the great majority of cars estimated to be in service in a particular area (Tr., Weber 861; [4] Wagner 1223–24; I.D.F. 64); or a "short line" of parts, a series of only high-turnover or "fast-moving" items in a specific category (Tr., Weber 861; I.D.F. 65).

The wholesalers in the automotive parts aftermarket generally have been characterized in this proceeding as "traditional" ("domestic") or "import specialist" WD's and jobbers. Traditional WD's principally stock replacement parts for domestic-made vehicles, but often stock a more limited number of parts for foreign-made vehicles (*see* Tr., Reichers 626; I.D.F. 72). Import specialist WD's handle foreign car parts and do not sell domestic car parts (Tr., Wagner 1232; I.D.F. 75), which seems to be a tradition held over from years when only these distributors sold replacement parts for the then-limited number of imported cars in this country. Jobbers who buy from WD's may specialize in domestic or foreign parts (Tr., Wildermuth 1396; Wagner 1232; I.D.F. 79), but it is not unusual for domestic jobbers to carry parts for the more popular foreign cars (Tr., Weber 846–47; I.D.F. 80–81), and some jobbers sell full lines of both domestic and imported parts (Tr., Wagner 1237; I.D.F. 81).[3] Some WD's obviously sell to both domestic and foreign car part jobbers (Tr., Wildermuth 1396; I.D.F. 81).

B. *Borg-Warner*

Borg-Warner's Automotive Parts Division (APD) produced for sale in the aftermarket eighteen lines of parts, three of which were ignition parts, wire and cable products, and carburetor tune-up kits (Tr., Reichers 622–23; the uses of these parts are described in I.D.F. 99, 113, and 125). In response to demand from its customers, Borg-Warner began adding fast-moving foreign car parts to its various lines in 1972 or 1973 (Tr., Reichers 639; Weber 861; I.D.F. 85, 86). Borg-Warner sells in the aftermarket to traditional warehouse distributors (Tr., Reich-

[3] I.D.F. 79, which implies that all jobbers specialize in either domestic or import car parts, must be read in conjunction with I.D.F. 80–81, which clarify that many jobbers carry both types of parts.

ers 625; I.D.F. 87). Borg-Warner's total sales of automotive parts in the aftermarket were approximately $69.1 million in 1978 (Tr., Reichers 621; BWX 34A, *in camera;* I.D.F. 84). Its sales of [5] ignition parts, wire and cable products, and carburetor tune-up kits with application on foreign cars were approximately $900,000 in 1978.[4]

C. *Bosch U.S.*

Bosch U.S.'s Automotive Sales to Manufacturers (ASM) division is engaged in sales of foreign car parts to manufacturers in the aftermarket, and its Automotive Sales to Independent Distributors (ASD) division is engaged in such sales to warehouse distributors in the aftermarket (Tr., Bendixen 894–95; I.D.F. 89). Bosch U.S. sells full lines of foreign ignition parts; the fast-moving parts constitute the majority of sales in this line (Tr., Weber 861–62; Wagner 1274–75; I.D.F. 109). Bosch U.S. sells two items in the wire and cable line for a wide range of foreign cars (Tr., Bendixen 898–99; I.D.F. 139);[5] and a line of carburetor tune-up kits for imported cars that is virtually identical to that of Borg-Warner—Borg-Warner manufactures all of Bosch U.S.'s carburetor kits (Tr., Weber 867; Wagner 1273; Bendixen 930; I.D.F. 122, 124). Bosch U.S. sells its lines of parts both to domestic and to import specialist WD's; thirty percent of its sales and seventy percent of its customers are domestic WD's (Tr., Bendixen 913–14; Wagner 1213, 1266–67; I.D.F. 90, 96, 98). Bosch U.S.'s sales in the aftermarket totalled $72 million in 1978; its sales to WD's in 1978 totalled $36 million. Approximately fifteen percent of its sales (*i.e.* $5.4 million of [6] sales to WD's) were in ignition parts, wire and cable products, and carburetor tune-up kits (Tr., Bendixen 913–17; I.D.F. 90, 91).[6]

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[4] Respondents have accepted this figure for purposes of their appeal (RAB 42–43, *citing* I.D.F. 104, 116, 134). Complaint counsel object to this figure, but their proposed figure includes some parts that are not part of the relevant product lines (*see* CAAB 21–22; RARB 23–24). Respondents did, however, in responding to interrogatories of complaint counsel, list sales of various ignition parts with application on imported vehicles totalling $1.116 million (*see* CAB 18, *citing* Confidential App. to Borg-Warner Int. No. 2, *in camera;* CPF 70). This would place Borg-Warner's total sales of the relevant parts at $1.4 million. We note that the interrogatory response seems to contain parts that may not have application on foreign vehicles (*e.g.* part no. E 1, *see* CX 4Z–206), but also that it is missing some parts with such application (*e.g.* part nos. A 534, A 535, C 561, C 576, D 575, E 38; *see* CX 5D; CX 5E; CX 5J; CX 5"O"; CX 5Q; CX 5T; CX 5W). Rather than searching for an exact figure that neither respondents nor complaint counsel saw fit to provide, however, we accept the ALJ's determination that Borg-Warner made $900,000 in sales of parts with application on imported cars in the ignition, wire and cable, and carburetor kit lines in 1978.

[5] The last sentence of I.D.F. 139 is inaccurate. The first sentence of this finding, which states that Bosch U.S. sells spark plug connectors as well as ignition cable sets, is correct.

[6] The testimony of Bosch U.S. as to its sales is somewhat sketchy. In response to complaint counsel's interrogatory no. 33, Bosch listed its total sales of wire and cable products for 1978 as $858,027; its total sales of carburetor tune-up kits at $151,197; and its total sales of ignition parts (that is, points, condensers, caps, rotors, ignition coils, switches, and regulators—the items Borg-Warner sells in its ignition parts line) at $11,368,917.

Complaint counsel's estimate of total sales must be rejected. Citing to I.D.F. 110, complaint counsel contend that Bosch U.S.'s sales of ignition parts alone totalled $30.3 million, more than the 15% of total aftermarket sales that Bosch claimed it made in all three lines (CAB 18; CAAB 21). As respondents correctly point out, however, complaint counsel have included alternators, generators, and starters in the ignition parts line (RARB 14 n.7). The ALJ properly found these items were not ignition parts (*see* I.D.F. 99).

D. *Bosch GmbH*

Bosch GmbH is the owner, both directly and indirectly through two subsidiary holding companies, of all of the capital stock of Bosch U.S. (Complaint and Bosch U.S. Ans. ¶4; Tr., Fiene 1323, 1329; I.D.F. 13, 35). Bosch GmbH elected all of the directors of 1329; I.D.F. 13, 35). Bosch GmbH elected all of the directors of Bosch U.S., and four of Bosch GmbH's directors also served on the board of Bosch U.S. during 1978 (Bosch GmbH Int. No. 9; Tr., Fiene 1325–26; I.D.F. 36–37). Bosch GmbH does not make sales to WD's in the United States, but it sells a substantial number of parts to Bosch U.S., the only company located in the U.S. to which Bosch GmbH makes sales (CX 88, at 29, 33–34; I.D.F. 59, 107). The ALJ entered numerous findings on the special relationship between Bosch GmbH and Bosch U.S. (I.D.F. 33–61; I.D. 52–56), which we will discuss below.

E. *The Individual Respondents*

Dr. Hans L. Merkle has been a member of the board of management of Bosch GmbH since 1958 and was its chairman in 1978. He had been a member of the board of directors of Bosch U.S. since 1967, and he joined the board of Borg-Warner on or about April 26, 1977 (Complaint & Merkle Ans. ¶6, Bosch GmbH Int. No. 10; CX 59L; CX 67A-B; I.D.F. 18–21).[7] [7]

Dr. Hans Bacher was a member of the board of Bosch GmbH since 1967, was a member of the board of Bosch U.S. during all times relevant to this proceeding, and became a director of Borg-Warner at the same time as did Dr. Merkle (Complaint & Bacher Ans. ¶7; Bosch GmbH Int. No. 10; CX 59M; CX 67A–B; I.D.F. 23–26).

After the trial in this proceeding, respondents notified the Administrative Law Judge that Messrs. Bacher and Merkle were no longer members of the Bosch U.S. board, and that certain changes in the Bosch parent-subsidiary structure had taken place.[8] On January 24, 1983, counsel for Hans Bacher notified the Commission of Dr. Bacher's death.

F. *Issues on Appeal*

Section 8 of the Clayton Act provides, in pertinent part:

> [N]o person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000 . . . , if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition

[7] Dr. Merkle was elected to Borg-Warner's board when Bosch GmbH acquired a 9.5% interest in Borg-Warner's stock for approximately $63 million (I.D.F. 27, 29).

[8] *See* Letter from Joseph A. McManus, Esq., *supra* note 1.

by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

15 U.S.C. 19.

The statute, on its face, contains four elements. First, a person must be simultaneously the director of at least two corporations. Second, at least one of the corporations must have capital, surplus, and undivided profits aggregating more than one million dollars. Third, the corporations must be engaged in whole or in part in commerce. Fourth, the corporations must be competitors. The first three of these elements are not in dispute.[9] The fourth is very much at issue.

Respondents raise several issues on appeal. First, they argue that Borg-Warner and Bosch U.S. do not compete and that the ALJ used an incorrect standard for determining "competition" under Section 8. Respondents also contend that Bosch GmbH does not exercise actual and direct control over the activities of [8] Bosch U.S. and cannot be held in violation of Section 8. Even if there was competition, respondents submit that it was *de minimis* and thereby not cognizable under Section 8. Further, respondents claim that a charge under FTC Act Section 5 cannot cure these defects in complaint counsel's Clayton Act Section 8 case. Finally, respondents argue that even if an order were appropriate, it should be narrow because the violation found was a "technical" one and because there is ample FTC precedent for a limited prospective order.

Respondents have also raised procedural issues in post-trial motions. They have alleged the prospect of *ex parte* communications between the Commission and its staff in this matter and another case, and they have moved the dismissal of this case, or its continued delay, on the grounds that the public interest weighs against a finding of liability with respect to the parent-subsidiary competition and *de minimis* competition issues.

Complaint counsel raise two issues on appeal. They claim that the ALJ was mistaken in finding that Borg-Warner and Bosch GmbH were not competitors as to automotive air conditioning compressors,[10] and that the ALJ's order was unduly narrow and should have extended to any interlocked "officer, agent or employee" of Borg-Warner.

II. COMPETITION BETWEEN BORG-WARNER AND BOSCH U.S.

Respondents assert that Borg-Warner and Bosch U.S. were not competitors for purposes of Section 8, claiming that these corpora-

[9] There was considerable skirmishing at trial over whether Bosch GmbH was "in commerce" in the United States (*see* I.D.F. 10; I.D. 53–54), but this issue was not raised on appeal.

[10] Complaint counsel have not appealed the ALJ's determination that Borg-Warner did not compete with Bosch U.S. or Bosch GmbH for sales of hydraulic products (CAB 4 n.1). Complaint counsel determined before trial to offer no evidence concerning the other products listed in the complaint, namely, automotive test equipment and carburetors (I.D. 2 n.1).

tions sold lines of parts to their warehouse distributors that were not substitutable, and that the parts were distributed in a manner that precluded competition.

The legal standard for competition under Section 8 has been examined in very few cases. The statute itself bars interlocking directorates among two or more corporations "if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws." 15 U.S.C. 19. The purpose of the statute was "to nip in the bud incipient antitrust violations by removing the [9] opportunity or temptation for such violations through interlocking directorates." *TRW, Inc. v. FTC,* 647 F.2d 942, 946–47 (9th Cir. 1981); *United States v. Sears, Roebuck & Co.,* 111 F. Supp. 614, 616 (S.D.N.Y. 1953).

The role of competition analysis in Section 8 is not to measure market power or to assess competitive effects; it is to establish a nexus of competitive interests between corporations sufficient to warrant concern over collusion or other outright market division should interlocked directors seek to share or exchange information. Proof of competition under this statute does not depend, therefore, on the kind of complex product market definition that may be required in a merger or monopolization case. *TRW, Inc.,* 93 F.T.C. 325, 380 (1979), *aff'd in part and rev'd in part,* 647 F.2d 942 (9th Cir. 1981). Interlocked directors of competing corporations have the incentive and ability, through access to confidential business information, to advise or direct that the competitive decisions of two or more corporations be made so as to minimize adverse effects on any or all of the competitors. As the House of Representatives report that supported passage of the Section stated:

> The truth is that the only real service the same director in a great number of corporations renders is in maintaining uniform policies throughout the entire system for which he acts. . . .

H.R. Rep. No. 627, 63d Cong., 2d Sess., pt. 1, at 20 (1914). Judge (now Justice) John Paul Stevens has summarized the legislative purpose that militates against endless economic analysis of "competition" under Section 8:

> We do not believe Congress intended the legality of an interlock to depend on the kind of complex evidence that may be required in a protracted case arising under §7. On the contrary, the statute reflects a public interest in preventing directors from serving in positions which involve either a potential conflict of interest or a potential frustration of competition. *Protectoseal Co. v. Barancik,* 484 F.2d at 589.

This is not to say that some sophistication in economic analysis cannot facilitate understanding of the competitive nexus. We have found it appropriate to draw by analogy on concepts applied under Section 2 of the Sherman Act and Section 7 of the Clayton Act (15 U.S.C. 2, 18) in determining competition under Section 8. *TRW, Inc.,* 93 F.T.C. at 380. In particular, the courts and the Commission in deciding Section 8 cases have drawn on the market definition analysis established in *Brown Shoe Co. v. United States,* 370 U.S. 294, 325 (1962), in order to "recognize competition where, in fact, competition exists." *TRW, Inc.,* 93 F.T.C. at 380, *citing United States v. Continental Can Co.,* 378 U.S. 441, 453 (1964). For example, in *TRW* the two [10] corporations were found to be competitors as to point-of-sale credit authorization and electronic funds transfer products, even though the products of each corporation functioned so differently from those of the other company that in almost all cases the products of only one of the corporations could meet a customer's requirements. As the court stated the problem, "[T]he products they offer, unless modified, are sufficiently dissimilar to preclude a single purchaser from having a choice of a suitable product from each." *TRW, Inc. v. FTC,* 647 F.2d at 946, 948. The Commission and the reviewing court found, however, that several of the seven indicia of a market set out in *Brown Shoe Co. v. United States,* 370 U.S. at 325, were met: the corporations were vying for the business of the same purchasers, were attempting to convince the same purchasers that their products best suited the purchasers' specific needs, were offering to modify existing equipment to meet purchaser needs, were being recognized as competitors by the industry and customers, were using similar production techniques, and were not serving distinct groups of customers. 647 F.2d at 946–47. A competitive nexus sufficient to find the two corporations "competitors" for purposes of Section 8 was therefore established, even though the corporations' products were "purchased by different types of users and functioned in different ways." 93 F.T.C. at 381.

This case is less difficult than others decided under Section 8, including *TRW.* There is ample evidence that many of the "fast-moving" foreign car parts sold by Bosch U.S. and Borg-Warner are substitutable and have no significant physical differences. The product catalogs, which were a great part of the decisive evidence in this proceeding (CX 3A–Z36; CX 4A–Z248; CX 5A–Z6; CX 15A–Z79; CX 16A–Z42; CX 17A–Z284), fully support the ALJ's findings that the two corporations' foreign-car ignition parts, wire and cable products, and carburetor kits were functionally equivalent.[11] These catalogs

[11] I.D.F. 69 is modified to reflect the fact that coverage of the parts lines of different manufacturers can be compared by examining not only the manufacturers' parts interchange lists but the entire catalog of each manufacturer.

show Borg-Warner and Bosch parts under the same headings for the same uses. As to ignition parts, Borg-Warner and Bosch U.S. catalogs in the record contain several such parts that are substitutable on a number of [11] imported cars.[12] Indeed, Borg-Warner's coverage in the fast-moving ignition parts—that is, points, condensers, distributor caps, and rotors for the most popular imported cars (Volkswagens, Toyotas, and Datsuns)—was comparable to that of Bosch U.S. and the corporations Bosch agreed were its competitors (Tr., Bendixen 922; I.D.F. 112). As to wire and cable products, Borg-Warner has an application for almost all the fast-moving foreign car part applications covered by Bosch U.S. (Tr., Nelson 513–14; CX 15; CX 17J–Z135, Z–247; I.D.F. 143). As to carburetor tune-up kits, respondents' own witness testified that Bosch U.S.'s coverage and Borg-Warner's coverage was comparable or "close to being the same, since Borg-Warner manufactures them for [Bosch U.S.]" (Tr., Wagner 1273, Bendixen 930; I.D.F. 117, 124). We adopt these findings of the ALJ, and we find that this evidence is conclusive indication of product substitutability.

We also believe that the record shows an industry perception of competition between Borg-Warner and Bosch U.S. as to foreign car parts, and an attempt on the part of these corporations to convince the same purchasers that their products suited the purchasers' needs. *See TRW, Inc. v. FTC,* 647 F.2d at 946, *quoting* 93 F.T.C. at 381–82. Seventy percent of Bosch U.S.'s customers are traditional WD's, once the exclusive customers of such domestic part producers as Borg-Warner. Thirty percent of Bosch U.S.'s sales in 1978 were to traditional WD's (Tr., Bendixen 912–15; I.D.F. 90, 97, 98). Borg-Warner, both in its catalogs (used for promotion and for customer reference) and in its advertising has promoted itself not only as a domestic part producer but also as an import car part producer (*e.g.* CX 4; CX 15; BWX 23G; BWX 25A; CX 70A-C). Bosch U.S. has advertised and thus held out for sale its parts in publications directed at both import specialist and traditional WD's and jobbers, and some consumers (RBUSX 12; Tr., Bendixen 931–33; I.D.F. 95). Both Borg-Warner and Bosch U.S. are members of the Automotive Warehouse Distributors Association, of which import specialist WD's are not members. The meetings of this trade association are a way for manufacturers to obtain new customers among traditional warehouse distributors (Tr., Wagner 1258–59; CX 85; I.D.F. 73). The conclusion is inescapable, even if only the manufacturer-to-WD market for these products is examined, that

[12] I.D.F. 111 describes some examples of parts which, as complaint counsel correctly point out, are illustrative of the parts produced by Borg-Warner and Bosch that are interchangeable. *See, e.g.,* CX 4Z–191, CX 17Z–121 (Borg-Warner ("B-W") part no. A 515 substitutable for Bosch U.S. ("BUS") part no. 1–237–013–026); CX 4Z–210, CX 17Z–38 (B-W part no. G 582 substitutable for BUS part no. 1–237–330–067); CX 4Z–196, CX 17Z–113 to 114 (B-W part no. C 541 substitutable for BUS part no. 1–235–522–027); CX 4Z–202, CX 15Z–89 to 91 (B-W part no. D 555 substitutable for BUS part no. 1–234–332–074).

Borg-Warner and Bosch U.S. have the same potential customers and that their [12] promotion activities have held out these corporations and their wares as including foreign car parts business.[13]

Respondents urge vigorously that there can be no competition between these two corporations because there are "distinct" channels of distribution and because the entire lines of ignition parts, wire and cable products, and carburetor kits of each corporation are not substitutable. First, we reject the assertion that there are clearly distinct channels of distribution. Borg-Warner and Bosch U.S. sell lines of parts to the so-called traditional WD's (Tr., Reichers 625; Wagner 1213, 1266; I.D.F. 87, 96). Both traditional and import part jobbers buy lines of parts from traditional and import specialist WD's (Tr., Wagner 1234, 1237; Wildermuth 1396–97; Weber 846–47; I.D.F. 78–81). Jobbers generally sell the parts to retail outlets such as repair shops and service stations where parts are sold individually, but some jobbers also make such retail sales (Tr., Weber 802–03; I.D.F. 62). Unlike the cases in which lines of distribution precluded competition,[14] various segments of both companies' lines of parts compete at every level of the distribution chain in this case.

The full-line/part-line distinction is also irrelevant for purposes of analysis under Section 8. Respondents urge, in essence, that we inquire into the total universe of companies and products in determining a relevant product market; respondents claim in particular that this market is larger than "fast-moving [13] foreign cars parts." A determination of competition under Section 8 does not depend on analysis as extensive as that required under Section 7. Detailed inquiry into the total universe of products and companies in defining a relevant market is crucial in Section 7 cases in order to assess market concentration and to measure the increase of market power under an aggregation of market shares. The probability of competitive effect is projected on the basis of this measurement. Under Section 8, however, the critical inquiry is to identify a competitive nexus between corporations sufficient to warrant concern over potential antitrust violations involving coordination of competition between the firms—in other

[13] Respondents did offer several industry witnesses that testified that they did not view Bosch U.S. and Borg-Warner as competitors. Some testified on the short-line, full-line differences (Tr., Weber 783, 830; Bendixen 918; Wildermuth 1407). Some testified that they knew of no "changeovers" or exercise of choices between the lines at the WD level (Tr., Johnson 981–82). These subsidiary arguments we will deal with below; in part, respondents expect too much of competition analysis under Section 8. The comments of two of these witnesses, however, are particularly telling. Mr. Rodger Wagner, National Sales Manager for Bosch U.S., after stating that he had never regarded Borg-Warner as a competitor, admitted that Borg-Warner was a competitor, at least in a limited way: "The amount of their business in my areas of responsibility from time to time, from [19]71 until now, Borg-Warner has never been a significant factor in the marketplace in imported car parts" (Tr., 1251). Further, an import specialist WD, Mr. Karl Heinz Flicker, admitted on cross-examination that he had previously stated to complaint counsel that Borg-Warner had a line of carburetor kits competitive with that of Bosch U.S. (Tr., 1193). It is with these three lines of parts, this "factor in the marketplace," that this case deals.

[14] *See, e.g., L.G. Balfour Co. v. FTC*, 442 F.2d 1, 11 (7th Cir. 1971) (college fraternity insignia jewelry not in same market with all emblematic jewelry).

words, to determine whether the products are sufficiently substitutable to raise a concern of price-fixing or other collusion. The statute simplifies this inquiry by requiring only that the firms allegedly interlocked are in fact competitors in regard to some product or service. We have described above the evidence of product substitutability, industry perception of competition, and lack of distinct customers, that in our view establishes such a competitive nexus. Moreover, the clear distinctions respondents seek to establish in this case between full lines and short lines become blurred upon close examination. Jobbers and WD's do not carry every part in a "full line" (Tr., Wildermuth 1409; I.D.F. 76); the fast-moving parts are by definition the majority of the parts stocked and sold from either type of line (*id.*); two firms need not manufacture or sell identical products or an identical range, selection, or number of products in order to compete;[15] **[14]** and the manufacturers themselves regard the ultimate consumers (who buy individual parts) as part of their markets.[16]

It is true that Borg-Warner not only deals primarily in domestic automotive parts, but distributes those parts through a chain of warehouse distributors and jobbers that have traditionally dealt only in parts for domestic automobiles. Bosch has dealt with a different body of distributors, those that are specialists in the distribution of foreign automotive parts. The "competitive realities" of this case, however—and of this industry generally—are that the growth of the market position of automobiles of foreign manufacture have led Borg-Warner into the decision to enter into the sale of a limited line of automotive parts that are most in demand for the purpose of repairs to popular foreign car makes, a field heretofore left to Bosch and other imported car parts firms. The record—simply put—is that Borg-Warner customers in the early 1970's were coming more and more to receive requests for parts from repair facilities for the best-known makes of foreign cars, and that Borg-Warner responded to that demand by the initiation of a **[15]** program of foreign car parts distribution.[17] As the

[15] *See United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *TRW, Inc. v. FTC*, 647 F.2d 942 (9th Cir. 1981); *George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc.*, 508 F.2d 547, 552 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Harnischfeger Corp. v. Paccar, Inc.*, 474 F.Supp. 1151, 1154–57 (E.D. Wisc.), *aff'd*, 624 F.2d 1103 (7th Cir. 1979).

[16] Norman Reichers (former vice-president of sales for Borg-Warner's Automotive Parts Division), in discussing "targeted accounts"—WD's that Borg-Warner wanted as customers—testified concisely as to the overlap of the markets:

> A targeted account is an account that we have selected in a specific marketing area that possesses the service power which would be inventories, sales organization, good jobber distribution, so forth, *to help us or enable us to get a larger percent of the potential market in that area*

(Tr. 663 (emphasis added)).

[17] *See* Tr., Reichers 639–40:

> Q. Can you tell me how it came about that Borg-Warner carries—Borg-Warner auto parts division offers parts for import car applications?
>
> A. The trend started in the early '70s. And somewhere along about '72 or '73 due to popular demand from our warehouse distributors, we started adding some applications for the extremely fast-moving popular import cars.

(footnote cont'd)

catalogs that form the body of evidence in this proceeding make clear, the Borg-Warner parts in question are complete substitutes for Bosch parts for identical uses on the same cars. The Administrative Law Judge, dealing with the argument of respondents that complaint counsel had failed to show that any distributor had switched its line of parts from one of these companies to the other, concluded nonetheless that purchasers of these parts had a "choice" between the two.[18] We think the analysis is more direct: Borg-Warner elected to enter into a limited but growing line of commerce, which was once the preserve of Bosch and other rivals in the business of supplying replacement parts for foreign cars. There is no gainsaying the simple conclusion that Borg-[16]Warner made a business decision to take advantage of growing consumer demand for fast-moving repair parts for the most popular foreign cars, and that the sales it made in this regard would otherwise have gone to Bosch or to other corporate rivals. This is competition.

The Commission holds that Borg-Warner was a competitor of Bosch U.S. in sales of ignition parts, wire and cable products, and carburetor tune-up kits with application on foreign cars, and that the presence of Messrs. Bacher and Merkle on the boards of both corporations was thus a violation of Section 8.

III. COMPETITION BETWEEN BORG-WARNER AND BOSCH GmbH

Respondents urge that the ALJ was mistaken in finding a violation on the part of Bosch GmbH. Although Messrs. Bacher and Merkle were directors of both Bosch GmbH and Borg-Warner during the relevant time period, respondents claim that Bosch GmbH cannot be deemed to have been a competitor of Borg-Warner by virtue of the parent-subsidiary relationship between Bosch GmbH and Bosch U.S. Indeed, there is no evidence that Bosch GmbH and Bosch U.S. do not maintain corporate formalities, or that Bosch U.S. is undercapitalized. Bosch GmbH itself does not make sales of automotive parts directly to WD's in the United States; Bosch GmbH's only sales of such parts in the U.S. are to Bosch U.S.

Q. To your knowledge were there other domestic parts suppliers who also added some foreign applications to their line about that time?

* * * * * * *

[A.] Yes. Yes, and that is why we got involved in it, because of popular demand.

[18] The language of "choice" was recently adopted by the Ninth Circuit in *TRW, Inc. v. FTC*:

Thus, in the eyes of the Commission, "competitors" are companies that vie for the business of the same prospective purchasers, even if the products they offer, unless modified, are sufficiently dissimilar to preclude a single purchaser from *having a choice* of a suitable product from each.

* * * * * * *

The Commission, we conclude, employed the proper legal standard for determining competition.

647 F.2d at 946, 947 (emphasis added). Unlike *TRW*, in which competition was found even though the products were "purchased by different types of users and functioned in different ways," 93 F.T.C. at 381, the instant case involves interchangeable products that were purchased by the same types of users for the same functional purposes in foreign cars.

The generally accepted principles for imputing a subsidiary's activities to its parent corporation under Section 8 are elementary and few. A parent corporation is not a competitor of another corporation merely because its subsidiary is. *United States v. Crocker National Corp.*, 656 F.2d 428, 450 & n.77 (9th Cir. 1981) (citing *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195, 1205 (2d Cir. 1978)), *rev'd on other grounds sub nom., BankAmerica Corp. v. United States,* 51 U.S.L.W. 4685 (U.S. June 8, 1983). *But see Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co.*, 1966 Trade Cas. (CCH) ¶71,678, at 82,065 (S.D.N.Y.) (subsidiaries, parents should not be considered in determining Section 8 competition). Conversely,

> to interpret Section 8 as meaning that the business activity of the subsidiary can never be considered in determining whether the parent is a "competitor" within the meaning of Section 8 would assume that Congress intended to permit such a simple and obvious means of avoidance as to render the statute meaningless, and would ignore the Supreme Court's admonition that the antitrust laws are "aimed at substance rather than form."

United States v. Crocker National Corp., 656 F.2d at 450, *citing United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947). [17]

In determining whether a parent corporation should be thus liable under Section 8, courts often have focused on the degree of "control" exercised by the parent over the subsidiary. For example, in *Crocker National Corp.*, the court of appeals held that "[i]f the parent substantially controls the policies of its subsidiary, it may fairly be said, in the language of the competing corporation provision of Section 8, that the 'business and location' of the parent include the business and location of the subsidiary." 656 F.2d at 450; *see also United States v. Cleveland Trust Co.*, 392 F.Supp. 699, 712 (N.D. Ohio 1974) *aff'd mem.*, 513 F.2d 633 (6th Cir. 1975); Kramer, *Interlocking Directorships and the Clayton Act After 35 Years,* 59 Yale L.J. 1266, 1268 n.11 (1950).

In any area of law, the criteria for deciding when a subsidiary's activities should be imputed to its parent corporation are based on the purpose of the law in question. As Judge Henry Friendly noted several years ago in a case interpreting the Norris-LaGuardia Act:[19]

> Whether a subsidiary corporation is to be considered a separate entity "cannot be asked, or answered, *in vacuo,*" Latty, The Corporate Entity as a Solvent of Legal Problems, 34 Mich. L. Rev. 597, 604 (1936); the issues in each case must be resolved in the light of the policy underlying the applicable legal rule, whether of statute or common law. . . . The policy behind the Norris-LaGuardia Act was a strong one; we

[19] In pertinent part, the Norris-LaGuardia Act forbade a court to issue an injunction against picketing "in any case involving or growing out of any labor dispute," which was defined in the statute as involving persons "who are engaged in the same industry, trade, craft, or occupation." *See* 303 F.2d at 372. The court was faced with the question whether a shipping company was in the same "industry, craft, or occupation" as a sister corporation in the wood-cutting business, which was the subject of a strike.

cannot think Congress would have meant this to be defeated by the fragmentation of an integrated business into a congeries of corporate entities, however much these might properly be respected for other purposes.

Bowater Steamship Co. v. Patterson, 303 F.2d 369, 372–73 (2d Cir.), *cert. denied,* 371 U.S. 860 (1962). In other words, the degree of deference accorded to the corporate entity depends on the legal rule at issue, and courts should give emphasis in their analysis to fulfilling the intent of the underlying statute. Thus, parent corporations are held liable for the subsidiary's tort or breach of contract on the "control" or "piercing the corporate veil" theory, which respects the limited liability of [18] the subsidiary's stockholder unless the parent corporation becomes so involved in the subsidiary's activities that regarding them as separate is an unacceptable fiction. *See generally Steven v. Roscoe Turner Aeronautical Corp.,* 324 F.2d 157 (7th Cir. 1963); *American Trading & Production Corp. v. Fischbach & Moore, Inc.,* 311 F.Supp. 412 (N.D. Ill. 1970). It is this type of common-law inquiry, which places heavy emphasis on corporate formalities and the degree of day-to-day interference in a subsidiary's management, that respondents urge as appropriate in Section 8 analysis. Strict adherence to this common law rule is not required under Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act (15 U.S.C. 18, 45), however, because the public interest in antitrust and consumer protection enforcement would be frustrated in many cases if separate corporate entities were respected universally. *See P.F. Collier & Son Corp. v. FTC,* 427 F.2d 261 (6th Cir.) (Section 5), *cert. denied,* 400 U.S. 926 (1970); *Jim Walter Corp.,* 90 F.T.C. 671, 734–35 (1977) (Section 7), *rem'd on other grounds,* 625 F.2d 676 (5th Cir. 1980); *Beneficial Corp.,* 86 F.T.C. 119, 159 (1975) (Section 5), *modified,* 542 F.2d 611 (3d Cir. 1976). *But cf. National Lead Co. v. FTC,* 227 F.2d 825, 828–29 (7th Cir. 1955) (applying "substantial identity" rule to clearly separate corporations charged with violations of Section 2(a) of Clayton Act and Section 5), *rev'd on other grounds,* 352 U.S. 419 (1957).

The policies behind Section 8 also do not merit strict adherence to the common law test of "control." The relevant inquiry under Section 8 is whether the parent company should be regarded as a "competitor" of the subsidiary's competitors, and whether an interlocked director is so placed as to be able to exercise control or even to substantially influence decisionmaking at the director level so as to dampen competitive relationships between divided corporate interests. The common-law "control" inquiry is relevant insofar as it is an indication of the likelihood of collusion and anticompetitive transfer of information among competitors. If a parent company has directors in common with its subsidiary's competitor, but if the parent exercises

little or no control over its subsidiary, there may be little opportunity for anticompetitive behavior. As the facts of this case show, however, there are factors other than those critical to a common-law inquiry that warrant a finding that Bosch GmbH is a competitor of Borg-Warner.

The Administrative Law Judge applied the "control" test, and entered detailed findings concerning the business relationship of Bosch GmbH and Bosch U.S. (I.D.F. 33–61, summarized at I.D. 54–56). The Commission adopts these findings and we need only highlight them here. Bosch GmbH wholly owns Bosch U.S., both directly and through holding companies in which Bosch GmbH is the majority shareholder (Tr., Feine 1329; I.D.F. 35). The president and chief executive officer of Bosch U.S. testified that he reports directly to Bosch U.S.'s board of directors, which in turn represents shareholder interests—with Bosch GmbH being the majority shareholder (CX 88, at 15; *see* Tr., Feine 1346– [19] 48). Bosch GmbH and its subsidiaries nominate and elect the directors of Bosch U.S. (Bosch GmbH Int. No. 9; I.D.F. 36). Bosch GmbH created Bosch U.S. in 1953 for the purpose of marketing products in the United States under the Bosch trademark (CX 88, at 25; I.D.F. 34). Bosch U.S. is the sole United States company licensed to use the Bosch trademark, for which Bosch U.S. pays trademark royalties to Bosch GmbH (Bosch GmbH RA 29; Int. No. 31(j); I.D.F. 55).

Bosch U.S. submits reports concerning its forecasts, operating results, balance sheets, and business plans to Bosch GmbH (Tr., Feine 1330; Bosch GmbH Int. No. 31, at 48; I.D.F. 46). The companies evaluate the products Bosch U.S. needs for the markets it attempts to service (Tr., Feine 1331; I.D.F. 48). To facilitate this goal, Bosch U.S. is privy to Bosch GmbH's research and development programs and has access to Bosch GmbH's engineering center (Tr., Feine 1331). Bosch GmbH suggests products that Bosch U.S. might introduce into the U.S. market, although on occasion Bosch U.S. has told Bosch GmbH that it cannot do so profitably for reasons of human and financial resources or U.S. statutory requirements (*id.;* I.D.F. 48). Although Bosch U.S. maintains a line of credit with domestic banks and has assets in excess of $100 million, it relies on contributions from Bosch GmbH for capital investment (Tr., Feine 1334–35; Bosch GmbH & Bosch U.S. RA 54–55; I.D.F. 53–54).[20] The two companies also evaluate how Bosch U.S. can best "identify [itself] as an American company doing business in America" (Tr., Feine 1331).

There is further evidence in this case that is more dispositive of parent corporation liability for purposes of Section 8 than it would be in a common-law determination. First, officers of Bosch GmbH and

[20] I.D.F. 53 should reflect the fact that Bosch GmbH has made continuing, rather than one-time, capital contributions to the business of Bosch U.S.

Borg-Warner had discussions about the business of Bosch U.S. which involved potential "cooperation" [20] relating to Bosch U.S.'s activities.[21] This evidence indicates to us that the "temptations" to anticompetitive behavior that the statute was established to abate were very nigh at hand. *See TRW, Inc. v. FTC,* 647 F.2d at 947. Second, four of Bosch GmbH's directors sat on Bosch U.S.'s board (Tr., Fiene 1325–26; I.D.F. 37), and two of these same directors—Dr. Bacher and Dr. Merkle—also sat on Borg-Warner's board (Complaint & Merkle Ans. ¶6; Complaint & Bacher Ans. ¶7; Bosch GmbH Int. No. 10; CX 59L; CX 67A-B; I.D.F. 17–26). Professors Areeda and Turner suggest that the legality of interlocks between a parent corporation and its subsidiary's competitor should be determined by asking "whether the subsidiary's business could ordinarily be expected to be the subject of the parent's boardroom deliberations." 5 P. Areeda & D. Turner, Antitrust Law ¶1302(b), at 367 (1980). In the instant case, this additional indication of "control" is met: Four members of the parent corporation's board had full knowledge of and input to the subsidiary's board deliberations, and two of the four also had similar knowledge of and input to the board actions of the subsidiary's competitor. [21]

Respondents impute great importance to the ALJ's finding that Bosch GmbH does not control the day-to-day activities of Bosch U.S. (I.D.F. 61). They also assert that the record in this case fails to establish systematic instructions from parent to subsidiary. We do not find such considerations dispositive in a Section 8 inquiry into whether a parent corporation is a "competitor" of its subsidiary's competitors. We would render the statute meaningless if we were to disregard the evidence of actual, or at least substantial control of Bosch GmbH over Bosch U.S., the evidence of discussions of "cooperation" between Bosch GmbH and Borg-Warner, and the presence of four of the Bosch GmbH directors on the Bosch U.S. board and the presence of two of these same directors on the board of Borg-Warner. We cannot accept the view that merely observing corporate formalities insulates a par-

[21] Borg-Warner Vice President of Engineering William H. Weltyk made the following report on his visit to Bosch GmbH in Stuttgart, Germany, on February 3–6, 1976:

> *We then met with Mr. Hertz who is in charge of the aftermarket outside of Europe. We talked in particular about Bosch's aftermarket activities in the United States which is headquartered in Chicago.* Their aftermarket group employs about 800 people and they have offices in New York, San Francisco and Houston. They have direct sales of 4 classes of trade: to warehouse distributors, to foreign vehicle distributors, to mass merchandisers and to outlets which specialize in diesel engines. In total, Bosch has about 1,000 direct accounts. Their primary products are spark plugs, starters, alternators (which are mainly rebuilt), *ignition parts* and electronic fuel injection equipment. *All in all, the Bosch organization seems to have a very adequate aftermarket group in the United States.* Mr. Hertz was not available for a very long time and therefore *we did not have ample opportunity to probe what opportunities for cooperation might exist in this area.* Also we were not able to cover distribution in South America or Mexico as a result of this tight schedule. *These topics will be reviewed further in future meetings.*

(CX 29I; I.D.F. 57 (emphasis added)).

ent corporation in situations such as this. The evidence as a whole fully justifies finding Bosch GmbH to be a competitor of Borg-Warner for purposes of Section 8.[22]

Respondents argue that Section 8 deals with "direct" and not "indirect" interlocks. *See* RAIB 9, *citing* Staff of House Comm. on the Judiciary, 89th Cong., 1st Sess., Report on Interlocks in Corporate Management 26 (Comm. Print 1965); Federal Trade Commission, Report on Interlocking Directorates, H.R. Doc. No. 652, 81st Cong., 2d Sess. 14–15 (1950). Indeed, the Administrative Law Judge characterized the Bosch GmbH-Borg Warner interlock as "indirect,"—an inappropriate term, in our view. None of the authorities cited by respondents and none that we have found include parent-subsidiary relationships among the lists of "indirect" interlocks. Situations such as that in the instant case are more accurately designated as direct interlocks between competing corporations, the fact that only the subsidiary was literally making competing sales having been disregarded on sound policy grounds. *See* 5 P. Areeda & D. Turner at ¶¶1302(b), 1304 (discusses parent-subsidiary interlocks as a problem separate from indirect interlocks); *United States v. Crocker National Corp.*, 656 F.2d at 451. [22]

Respondents also contend that if Congress had intended to prohibit such arrangements under Section 8, it would have done so specifically. Respondents cite several statutes, including Section 7 of the Clayton Act, in which Congress specifically included "indirect" or vicarious liability (*see* RAIB 6–7). We do not find this argument persuasive. The legislative history of Section 8 does not indicate precise limitations on which corporations can be deemed competitors by virtue of a closely related corporation's activities. Moreover, statutes that make no mention of liability of a parent or any other related corporation often are found to include such liability if strong public policy grounds warrant it. *See, e.g., Bowater Steamship Co. v. Patterson,* 303 F.2d 369 (2d Cir.), *cert. denied,* 371 U.S. 860 (1962).

Respondents urge that parent corporation liability under Section 8 would necessitate involved, case-by-case evaluations of the parent company's "control" of its subsidiary (RAB 44–47). We agree that this approach may not promote judicial economy as much as would a blanket rule barring liability in any parent corporation. At least one

[22] On the other hand, application of the same principles of analysis frustrates complaint counsel's appeal of one portion of the Initial Decision. The ALJ concluded, and we agree, that complaint counsel did not meet their burden of showing that Bosch GmbH exercised sufficient control over Femsa, Inc. to warrant imputing Femsa's production of automotive air conditioning compressors to Bosch GmbH. Although the record shows that Bosch GmbH owns more than 50% of Femsa, Inc.'s capital stock, directly or indirectly, we agree with the ALJ's determination that there is insufficient evidence of control or of corporate contacts to warrant a finding that Bosch GmbH and Borg-Warner competed in sales of air conditioning compressors through the remote corporate relationship with Femsa (*see* I.D. 52; I.D.F. 214–44). Complaint counsel's argument to the contrary in appeal of the Initial Decision is, therefore, rejected.

case has suggested, however, that barring parent corporation liability completely might encourage the establishment of technically remote corporate relationships in order to frustrate accountability for Section 8 liability. *See United States v. Crocker National Corp.*, 656 F.2d at 450. More importantly, such a blanket rule would elevate form over substances, and would do violence to the statutory purpose of preventing director interlocks that raise concerns of anticompetitive decision-making.

The Commission holds that Bosch GmbH was a competitor of Borg-Warner for purposes of Section 8. The presence of Messrs. Bacher and Merkle on the boards of both Borg-Warner and Bosch GmbH constituted an interlocking directorate among corporations that "are or shall have been theretofore, by virtue of their business and location of operation, competitors"—a violation of Section 8. [23]

IV. *DE MINIMIS* DEFENSE

Respondents claim that Section 8 contains a *de minimis* exception, and that even if there is competition between the corporate respondents, Borg-Warner's sales of the relevant products were too small for liability to attach.[23]

The statute itself contains no such exception. *TRW, Inc. v. FTC*, 647 F.2d at 948. Implicit in the statute's million-dollar net worth requirement and explicit in the legislative history of Section 8[24] is the judgment of Congress that the size of the interlocked corporations is the crucial *de minimis* inquiry. In [24] other words, it is the character of the restraint rather than the amount of commerce involved that Section 8 addresses. *United States v. Sears, Roebuck & Co.*, 111 F.Supp. at 621.

Courts nevertheless have disagreed about whether Section 8 forbids

[23] By framing the issue around Borg-Warner's sales of the relevant products and the small percentage of Borg-Warner's business that such sales constituted, respondents take a narrow view of what could constitute *de minimis* competition. Section 8 decisions often have examined the combined sales of the relevant products among *all* of the interlocked corporations. *See, e.g., United States v. Sears, Roebuck & Co.*, 111 F.Supp. at 615, 621 (combined sales of $80 million do not come within *de minimis* principle); *Perpetual Fed. Sav. & Loan Assoc.*, 90 F.T.C. 608, 652 & n.10 (1977) (multimillion-dollar figures for loans in all respondent banks could "in no way be termed *de minimis* amounts"), *rem'd on other grounds*, No. 78-1134 (4th Cir. Nov. 10, 1978), *order withdrawn*, 94 F.T.C. 401 (1979). If combined sales were estimated in a *de minimis* rule, Bosch U.S.'s sales and those of Borg-Warner would amount to at least $6.3 million—clearly not *de minimis*. *See supra* notes 4, 6 and accompanying text; *infra* text accompanying note 29.

A *de minimis* rule also might examine the extent to which the interlocking companies occupy the markets of their competing products. *See United States v. Sears, Roebuck & Co.*, 111 F. Supp. at 620 (interlocked companies had sufficient market share to raise potential of either one gaining "total absorptive capacity" in certain communities by anticompetitive agreement). Such a rule, however, would require more complex evidence of the sort Congress did not intend to be required in Section 8 cases. *See Protectoseal Co. v. Barancik*, 484 F.2d at 589.

Although some consideration of these factors may properly be a part of guidelines for prosecutorial discretion in Section 8 cases, a detailed examination of size of industries, size of corporations, percentages of sales, or volumes of commerce is not properly a part of an adjudicative case under Section 8.

[24] *See* H.R. Rep. No. 627, 63d Cong., 2d Sess., pt. 1, at 19–20 (1914) ("great corporations" with more than $1 million net worth, not "smaller industrial corporations," subject to Section 8); S. Rep. No. 698, 63d Cong., 2d Sess. 15–16 (1914) (same); *see also* Pres. Woodrow Wilson's Message to Congress, Jan. 20, 1914, *reprinted in* H.R. Rep. No. 627, *supra*, pt. 1, at 17–18 (enumerating evils inherent in director interlocks among "great corporations").

interlocking directorates if only a *de minimis* amount of commerce is involved.[25] Two district court cases decided several years ago indicated that Section 8 included such a *de minimis* defense. *See Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co.,* 1966 Trade Cas. (CCH) ¶71,678, at 82,065 (S.D.N.Y.) (*de minimis* competition not encompassed by Section 8); *United States v. Sears, Roebuck & Co.,* 111 F.Supp. at 621 (appreciable part of interstate commerce does "not come within the *de minimis* principle"). Recent cases, however, have found that Section 8 does not allow a *de minimis* defense. *See TRW, Inc. v. FTC,* 647 F.2d at 948 (*de minimis* exception not contemplated by Section 8); *United States v. Crocker National Corp.,* 422 F.Supp. 686, 703 (N.D. Cal. 1976), *rev'd on other grounds,* 656 F.2d 428 (9th Cir. 1981), *rev'd on other grounds sub nom., BankAmerica Corp. v. United States,* 51 U.S.L.W. 4685 (U.S. June 8, 1983).

In *TRW, Inc. v. FTC,* the most recent case to examine the issue and the only court of appeals case to do so, the Ninth Circuit rejected a *de minimis* defense to Section 8. The court reasoned that Section 8 was designed to prevent restraints on competition before they materialized by outlawing interlocking directorates which facilitated such restraints. 647 F.2d at 948. The court determined that "Congress undoubtedly was as concerned with restraints that stop the growth of competition at a low level as it was with restraints affecting substantial segments of commerce." *Id.* The court found, therefore, that Congress intended to reach interlocks between competitors without regard to the amount of commerce that might be restrained. *Id.,* [25] *citing United States v. Crocker National Corp.,* 422 F.Supp. at 703; *United States v. Sears, Roebuck & Co.,* 111 F.Supp. at 619–21.

We find this reasoning persuasive. Implicit in the reasoning of the court of appeals was the philosophical underpinning of Section 8 that lies in the Sherman Act's proscription against collusion and other forms of trade restraint. Congress enacted Section 8 partly in response to the difficulties of proof under the "rule of reason" established for Sherman Act violations by the Supreme Court in *Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1 (1911). Investigations of the "trusts" stimulated legislation that would reach specific practices at an early stage and arrest conspiratorial growth in its incipien-

[25] Commentators likewise have disagreed about whether Section 8 contains or should contain a *de minimis* exception. *See, e.g.,* Halverson, *Should Interlocking Director Relationships Be Subject to Regulation and, If So, What Kind?* 45 Antitrust L.J. 341, 342–43, 350–51 (1976) (although Section 8 is *per se* statute, Commission has discretion not to prosecute small Section 8 cases); Kramer, *Interlocking Directorships and the Clayton Act After 35 Years,* 59 Yale L.J. 1266, 1268–69 (1950) (different interpretations possible but court decisions predicted to give little or no weight to amount of commerce involved); Travers, *Interlocks in Corporate Management and the Antitrust Laws,* 46 Tex. L. Rev. 819, 846 (1968) (policy considerations suggest that no explicit *de minimis* exception should be recognized); Wilson, *Unlocking the Interlocks: The On-Again Off-Again Saga of Section 8 of the Clayton Act,* 45 Antitrust L.J. 317, 324 (1976) (suggesting Section 8 includes *de minimis* concept); Note, *Interlocking Directorates and Section 8 of the Clayton Act,* 44 Alb. L. Rev. 139, 145 (1979) (competition must not be *de minimis,* citing *Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co.*).

cy—before the actual vesting of anticompetitive effects. Interlocking directorates were one of the specific practices deemed so likely to facilitate collusion as to deserve outright condemnation even in the absence of express evidence of collusion itself. Staff of House Comm. on the Judiciary, 89th Cong., 1st Sess., Report on Interlocks in Corporate Management 2 (Comm. Print 1965). Therefore, unlike Section 7 of the Clayton Act, 15 U.S.C. 18, which proscribes certain stock acquisitions if "the effect . . . may be substantially to lessen competition," Section 8 is a *per se* statute that requires no showing of industry domination and no showing of present or potential anticompetitive effects. *See id.; TRW, Inc. v. FTC,* 647 F.2d at 948 (citing *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 221–23 (1940)); *United States v. Crocker National Corp.,* 422 F.Supp. at 703; *United States v. Sears, Roebuck & Co.,* 111 F.Supp. at 620–21. Such a *per se* statute logically excludes the sort of level-of-commerce analysis urged by respondents as well. Congress did not, of course, have before it in 1914 the sophisticated analysis of competitive relationships that has attended antitrust inquiries into conglomerates and multinational economic interests in more recent times. Congress nonetheless has declined thus far to alter the *per se* rule for finding a violation under Section 8. **[26]**

Respondents claim that the "so that" clause of Section 8[26] is, in effect, a *de minimis* limitation. Because there were no *per se* rules in 1914, so the argument runs, Congress could not have established such a rule in Section 8 (RAB 35–38). As we have noted, however, Congress enacted Section 8 specifically to obviate the necessity for a Sherman Act "rule of reason" approach. We agree with the ALJ and the courts that have examined this issue: the "so that" clause of Section 8 is satisfied if price-fixing arrangements among the competing corporations would be illegal, as they would be in this and virtually any other case without regard to the amount of commerce involved. *See TRW, Inc. v. FTC,* 647 F.2d at 948; *United States v. Crocker National Corp.,* 422 F.Supp. at 703; *United States v.* **[27]** *Sears, Roebuck & Co.,* 111 F.Supp. at 616–17, 620–21. We find unpersuasive respondents' arguments that the "so that" clause is a *de minimis* limitation on Section

[26] Section 8 prohibits interlocking directorates among two or more corporations in interstate commerce if any one corporation has a net worth of more than $1 million and

> if such corporations are . . . competitors, *so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.*

15 U.S.C. 19 (emphasis added). The leading case interpreting the "so that" clause is *United States v. Sears, Roebuck & Co.,* in which the court held that if price-fixing arrangements or territorial divisions among the competitors would violate the antitrust laws—and they would, because such agreements are *per se* violations—the "so that" clause of Section 8 would be satisfied. 111 F.Supp. at 616–17, 620–21. *See also* 5 P. Areeda & D. Turner, Antitrust Law ¶ 1302(a), at 364 (1980).

8.[27]

It should be noted that respondents' sales volume in the relevant products is not insubstantial. Even with a view of the evidence most favorable to respondents,[28] Bosch U.S.'s sales of the relevant products to WD's totalled approximately $5.4 million, and Borg-Warner's sales totalled approximately $900,000. In *TRW, Inc.*, the Commission found that $1 million and $7 million in sales of the relevant products by the respective corporations were not *de minimis* under Section 8, assuming arguendo that a *de minimis* defense applied. 93 F.T.C. at 385–86. In *Protectoseal Co. v. Barancik,* Judge Stevens found a violation of Section 8 where one of the corporations did $1.5 million of business in the relevant products and the other corporation met the $1 million net-worth requirement. 484 F.2d at 587 & n.3. The relevant amount of commerce engaged in by respondents in the instant case is comparable to that involved in *TRW, Inc.* and *Protectoseal,* and as such would not in any event meet a *de minimis* standard. These decisions bear out the analytic principle that it is not the volume of commerce that is the proscriptive concern of Section 8, but rather the character of the potential overt antitrust violation.

Finally, respondents raise several policy considerations that would support a *de minimis* doctrine. Respondents note than outside directors such as Messrs. Bacher and Merkle are valuable to such corporations as Borg-Warner. Respondents claim further that it is burdensome for directors of multinational corporations to search out every competitive overlap among all the [28] corporations for which they are directors. We recognize such realities. A corporation can, however, benefit from such industry experts in other ways, such as retaining such experts as consultants, without placing them in the position of ultimate corporate decisionmaking from which it is possible to fix prices or otherwise restrain competition—the matter with which the statute is ultimately concerned. Although consideration of the level of commerce affected is appropriate in determining the scope of any order issued for violations of this Section,[29] we hold that there

[27] Respondents further contend that the Commission has established a *de minimis* standard by entering several consent orders in which respondents could not share directors with competing corporations if a certain level of commerce or a certain percentage of respondents' business were implicated (RAB 38–41). These cases did not, as respondents contend, "license violations of the law" in certain levels of commerce, nor did they establish a *de minimis* standard. Rather, the consent decrees reflected an exercise of the Commission's discretion not to prosecute Section 8 violations in particular situations. Respondents' reliance on these cases for a legal proposition is even more misplaced because consent orders are the product of negotiation and compromise and do not establish the criteria against which litigated cases are to be measured. *See United Van Lines, Inc. v. United States,* 545 F.2d 613, 618 (8th Cir. 1976); *see generally United States v. ITT Continental Baking Co.,* 420 U.S. 223, 235–37 (1975); *United States v. Armour & Co.,* 402 U.S. 673, 681–82 (1971).

[28] *See supra* notes 4, 6 and accompanying text.

[29] Level of commerce considerations also may be relevant in a decision whether to exercise prosecutorial discretion to bring a Section 8 complaint. Several lines of parts involving millions of dollars in commerce were alleged in the complaint to be competitive in this case, however—clearly not *de minimis* commerce for purposes of a decision to issue a complaint against respondents.

is no *de minimis* defense to a Section 8 violation.

V. SECTION 5

Respondents claim that the Administrative Law Judge erred in finding, as an alternative to Section 8 liability, that respondents' conduct violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. We find that respondents violated Section 5, because a violation of Section 8 is in itself a violation of Section 5. *See FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239–44 (1972) (Section 5 encompasses violations of letter and spirit of antitrust law); *TRW, Inc.*, 93 F.T.C. at 386 n.22 (based on Section 8 violation, Section 5 violation found); S. Rep. No. 597, 63d Cong., 2d Sess. 13 (1914) (Section 5 encompasses interlocking directorates). We do not reach the issue whether respondents' interlocking directorates would have been an unfair method of competition under Section 5 absent a violation of Section 8.[30]

VI. REMEDY

The ALJ's order directs that Messrs. Merkle and Bacher resign either from the board of Borg-Warner or from the boards of Bosch GmbH and its subsidiaries. The order further directs that respondent corporations shall not establish director interlocks with any other competing corporation in "the production or sale of any product or service." The order also requires, for a [29] period of ten years, that corporate respondents obtain from their directors a list of such persons' other corporate directorships and the products or services produced by such corporations. Respondents must file compliance reports annually for ten years showing their adherence to the terms of the order. The order itself is in perpetuity.

Respondents contend that even if a Section 8 violation is found in this case, the order recommended by the ALJ is inappropriate and even punitive because the violation found was a "technical" and "narrow one" (*see* RAB 49; I.D. 58). In particular, respondents object to the breadth of the order's coverage; its perpetual nature; its "elaborate and burdensome" compliance reporting requirements; its lack of a floor level of competitive overlap at which interlocking directorates must be scrutinized in order to comply with the order; and its application to potential corporate overlaps involving firms other than respondents. Complaint counsel, for their part, would extend the order to proscribe officers, employees, or agents of one respondent (Bosch) from sitting on the board of the other (Borg-Warner).

[30] In *Perpetual Fed. Sav. & Loan Assoc.*, the Commission found that Section 5 could reach director interlocks between banks and a savings and loan association, even though Section 8 did not reach such interlocks, because such interlocks violated the policy of Section 8. *See* 90 F.T.C. 608, 652–57 (1977), *rem'd on other grounds*, No. 78–1134 (4th Cir. Nov. 10, 1978), *order withdrawn*, 94 F.T.C. 401 (1979).

We approach our decision on the scope of the order in this case with well-settled standards. Commission orders must be reasonably related to the unlawful practices found to exist.[31] The Commission has wide discretion in the choice of relief it deems adequate to remedy unlawful practices, *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952), and when a respondent has been found in violation of the law, it must expect some "fencing in," *FTC v. National Lead Co.*, 352 U.S. 419, 431 (1957). In this instance, the order issued by the Administrative Law Judge is typical of those issued in Section 8 proceedings in the past.

We agree with the ALJ that an order should issue against all respondents in this case. Even though Messrs. Merkle and Bacher apparently resigned their directorships with Bosch U.S. (after the trial in this case),[32] respondents did not maintain that these individuals discontinued service as directors of Bosch GmbH or Borg-Warner. As this opinion has affirmed, common directorships between Borg-Warner and Bosch GmbH violated Section 8 of the Clayton Act; this violation continued unabated beyond the resignation of the individual respondents from the Bosch U.S. board. Nor is this a violation situation in which directors are interlocked without knowledge of corporate overlaps. (CX 29I; I.D.F. 57; CPF, at 98; *see supra* note 21). Moreover, there is a **[30]** "cognizable danger" that a violation could recur with respect to Bosch U.S. in its future board elections. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Resignation from a board by an interlocked director at the onset of Section 8 litigation has been consistently held insufficient to prevent entry of an order against both individual and corporate respondents. *See id.* at 633–34; *Kraftco Corp.*, 92 F.T.C. 416, 419 (1978), *aff'd sub nom. SCM Corp. v. FTC*, 612 F.2d 707 (2d Cir.), *cert. denied*, 449 U.S. 821 (1980). The order is necessarily and properly applicable, therefore, to all three corporate respondents. Because of the death of individual respondent Hans Bacher, an order provision with respect to individual respondents will be limited to Hans Merkle.

Some recent Section 8 decisions have addressed whether injunctive relief is appropriate beyond the undoing of the immediate interlocking directorates that are the subject of the Section 8 proceeding. In *SCM Corp. v. FTC*, 565 F.2d 807, 812–13 (2d Cir. 1977), the Court of Appeals for the Second Circuit remanded a Section 8 proceeding to the Commission because the Commission had failed to acknowledge that it bore the burden of showing a "cognizable danger of recurrent violation" as justification for an order barring future interlocks, citing *United States v. W.T. Grant Co.*, 345 U.S. at 633. On remand, the

[31] *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394–95 (1965); *FTC v. National Lead Co.*, 352 U.S. 419, 428–30 (1957); *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946).

[32] *See* Letter from Joseph A. McManus, Esq., *supra* note 1.

Commission reimposed its order after an analysis under the appropriate standard, and that order was upheld by the court of appeals.[33] Likewise in *TRW, Inc. v. FTC,* 647 F.2d 942 (9th Cir. 1981), the Court of Appeals for the Ninth Circuit declined to approve a prospective order where a director had removed himself from any interlock prior to the initiation of litigation by the government.

In these two cases, the courts included among the considerations relevant to assessment of the "cognizable danger" component of injunctive relief the following: whether an interlocking directorate was voluntarily discontinued prior to the onset of Section 8 litigation, whether respondents promised to avoid interlocking directorates in the future, and whether there was evidence of a Section 8 compliance program in operation. In this case, Drs. Merkle and Bacher only resigned from the Bosch U.S. board after the trial was virtually complete, and have remained interlocked on both the Borg-Warner and Bosch GmbH boards. Nor does there appear to be record evidence of any effort by respondents to prevent future interlocks, or to establish a systematic compliance program. On the contrary, respondents seem not to have screened their directors for interlocks in this case (RARB 31), and are determined to maintain the closest of Bosch corporate company control over Borg-Warner (RB 43). **[31]**

While we believe that injunctive relief barring future interlocks is appropriate in this case, we do agree that the order entered by the ALJ should be limited in three important respects suggested by respondents. Rather than a perpetual ban on all relevant competitive interlocks, a ten-year ban, tracked by the compliance reporting system already in the ALJ's order, would seem to guard against the continuation of Section 8 problems for the foreseeable future.

We also believe that prospective relief applicable to these corporate respondents and other corporations (Paragraphs I(b) and II(b) of the Final Order) should be limited to automotive parts for the automotive aftermarket. Traditional Section 8 relief tracks the "all products" relief contemplated in the complaint's Notice Order and proposed by the ALJ, but the Commission believes that the competitive concerns identified in this proceeding and the evidence on the likelihood of repeated interlocks justifies a narrower order. This record, in focusing on three types of specific automotive parts for the aftermarket, does not provide an all-inclusive definition of such automotive parts. There was testimony and documentary evidence, however, describing the lines of parts sold by the corporate respondents at the time of the proceeding,[34] and it is to these parts that the order proscription ap-

[33] *Kraftco Corp.,* 92 F.T.C. 416 (1978), *aff'd sub nom. SCM Corp. v. FTC,* 612 F.2d 707 (2d Cir.), *cert. denied,* 449 U.S. 821 (1980).

[34] Specifically, we refer to the parts sold by Borg-Warner's Automotive Parts Division (Reichers 623), and the ASM and ASD divisions of Bosch U.S. (Bendixen 894–895, CX 17A–Z 284).

plies. Thus the prospective relief applicable to corporations other than the named respondents themselves is confined to the actual range of automotive parts sold by these respondents during the course of these proceedings.

Finally, we believe that respondents' compliance obligation with these prospective provisions of the order should not extend below overlapping levels of commerce found in this proceeding with respect to interlocks between respondents and other corporations. Complaint counsel alleged in the complaint that the competitive overlap between Borg-Warner and Bosch U.S. involved several closely related product lines encompassing multimillion-dollar sales. Only three product lines proved to be competitive, however, involving approximately $900,000 and $5.4 million in sales for the respective corporations. These are relatively small fractions of the total business of these corporations, and in shaping relief we are convinced that other than in interlocks between these corporate respondents, the public interest is served in requiring respondents to submit reports of competitive overlaps of $5 million or more. As between these respondents, however, we believe traditional relief, without limitations as to products or volumes of commerce has been justified in this record. [32]

Complaint counsel seek an order that would extend beyond director interlocks to officers, employees, or agents of respondents. The logic of such relief is that whatever danger of collusion adheres in director interlocks can be achieved through the use, for instance, of an officer of one corporation as a director of another. Evasion of an order barring only interlocking directors is therefore relatively easy, and these respondents have indicated already their intention of using nondirector Bosch representatives on Borg-Warner's board should an order be entered. Nevertheless, Section 8 speaks only of interlocked *directors* and Congress has repeatedly declined to amend the statute to extend its prohibitions (RAIB 7). No litigation under Section 8 has resulted in an order such as that pressed by complaint counsel on this point. The statute's limitation is based on concern about ultimate corporate decisionmaking, and does not seem aimed at the suppession of all intercorporate relationships or information exchanges. The antitrust laws other than Section 8 remain to guard against improper communications between such non-director personnel. Accordingly, we deny complaint counsel's appeal on the scope of this order.

Finally, we note that during the pendency of this proceeding the Bosch companies underwent a corporate reorganization. *See* Letter from Joseph A. McManus, *supra* note 1. We believe that the competitive concerns raised by this reorganization in light of this case are satisfied by an order that is binding on the named respondents and

their successors and assigns.[35]

VII. RESPONDENTS' POST-TRIAL MOTIONS

Respondents initiated two rounds of post-oral-argument briefing, based on developments beyond the record of this proceeding. The first of these was initiated by a motion filed on August 20, 1981, raising the issue of alleged *ex parte* communications between staff and the Commission involving this matter and the Commission's July 23, 1981, issuance of a complaint in Docket No. 9157. The latter case is a Section 7 Clayton Act proceeding that challenges Borg-Warner's sale of its Automotive Parts Division (APD) to Echlin Manufacturing Corporation. Respondents asserted that arguments made in connection with our deliberations on the complaint in Docket No. 9157 were incestuously related to product market issues involved [33] in this proceeding. By order of May 13, 1982, the Commission granted in part and denied in part respondents' motion for full disclosure and access to records, in disposition of this issue. We believe the Commission's order demonstrates that the Commission has scrupulously adhered to the principles of both the Administrative Procedure Act and the Commission's rules of procedure in dealing with these alleged *ex parte* matters.

The second round of briefs in this matter was occasioned by respondent's December 14, 1981, "Motion by All Respondents to Dismiss Proceeding for Lack of Public Interest, or Alternatively, to Defer Decision on Appeal Pending Consideration of New Clayton Section 8 Guidelines." In this motion, respondents argue for dismissal of this proceeding because its continuation is no longer in the public interest. The basis for the argument is, first, that the competitive overlaps in the interlocking directorates case are very small, and, as a consequence, any finding of a violation of the Clayton Act would be "very narrow and technical" (RMD 2). Second, respondents argue that this proceeding has been mooted by the exit of Borg-Warner from the automotive parts business through the sale of APD to Echlin. Third, respondents in effect incorporate their *ex parte* communications argument, the subject of the August 20, 1981, motion, as part of their motion for dismissal of this proceeding.

Respondents' alternative motion, to defer issuance of a Commission decision in this matter, is based on suggestions that the Commission should first promulgate Clayton Act Section 8 enforcement policy guidelines on interlocking directorates. Respondents declare that

[35] As discussed above, the order prohibits various interlocks between corporate respondents (or their successors and assigns) and between corporate respondents and other corporations. The order, of course, only prohibits interlocks between corporations that are competitors. In determining whether a corporation is a "competitor," the business of any subsidiary that is subject to actual or substantial control of the parent will be imputed to that parent (*See* Section III *supra*).

such guidelines might bear on issues raised in this case such as on whether there should be created a *de minimis* competition exception to Section 8 liability, and whether Section 8 can be applied to an interlock involving the foreign parent of an allegedly interlocked competing subsidiary firm.

Most of the issues raised in respondents' motions are dealt with in this opinion. Two issues are raised that bear additional consideration, however. The Commission has not promulgated Section 8 guidelines, and even if it had, the issuance of guidelines relating to prosecutorial discretion over case selection or investigative review would not, as respondents seem to suggest, determine what constitutes a violation of law in any particular adjudicative context.

More significantly, we do not agree that this case has become moot because Borg-Warner has sold its Automotive Parts Division, removing the alleged competitive overlap that is the focus of this case. It is well settled that "voluntary cessation of illegal conduct" does not make a Section 8 case moot. *United States v. W.T. Grant Co.*, 345 U.S. at 632. A Section 8 case is mooted only if the respondent or defendant can demonstrate that there is "no reasonable expectation that the wrong will be repeated. The burden is a heavy one." *Id.* at 633; *TRW, Inc. v.* [34] *FTC*, 647 F.2d at 953; *SCM Corp. v. FTC*, 565 F.2d at 812. The concern is with repeated violations of the same law, not merely with repetition of the same offensive conduct—that is, the interlock challenged in the particular case. *TRW, Inc. v. FTC*, 647 F.2d at 953. We do not think that defendants have met their burden to show that there is no reasonable expectation of future violation. Moreover, Borg-Warner's effort to sell its APD is the subject of an ongoing Section 7 Clayton Act proceeding that, according to the Notice of Proposed Relief, seeks divestiture or, alternatively, rescission of the Borg-Warner sale of APD. Although respondents believe the potential for rescission of the APD sale is purely "speculative," we believe to the contrary that such a prospect illustrates the speculative nature of the mootness argument itself.[36] In view of the factors discussed here and in Section VI *supra*, we also find that despite the sale of the Automotive Parts Division there is a "cognizable danger" of a recurring violation of Section 8 sufficient to warrant issuance of a cease and desist order. The Commission's order provision requiring the individual respondents to resign from either the Borg-Warner or Bosch

[36] "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968), *rev'g* 273 F.Supp. 263 (S.D.N.Y. 1967), *on remand* 1969 Trade Cas. (CCH) ¶72,719 (S.D.N.Y.).

The present case presents a situation unlike that in *United States v. Cleveland Trust Co.*, 392 F.Supp. 699 (N.D. Ohio 1974), *aff'd mem.*, 513 F.2d 633 (6th Cir. 1975), in which one of the interlocking corporations mooted the case by selling the division that produced its competitive line of commerce. Here, the pending Section 7 case challenging such a sale raises more than mere "conjectural" concerns that a violation could recur. *See id.* at 710.

boards, however, does not come into force until and unless there is competition between the corporate respondents. [35]

Should any future change of law or fact occur with regard to matters raised in this case, respondents have available the remedies set out in the Commission's Rules of Practice at Sections 2.51 and 3.72, 16 C.F.R. 2.51, 3.72 (1982), providing the right to petition the Commission to reopen and to modify or to set aside an order, based on changed conditions of law or fact or other public interest considerations not now before the Commission.

We believe that respondents' motions of December 14, 1981, must be dismissed.

DISSENTING STATEMENT OF CHAIRMAN JAMES C. MILLER III*

Today the majority interprets the relevant statutory and case law as requiring ineluctably the conclusion that Section 8 of the Clayton Act is what may be termed a "strict" *per se* statute that is unconcerned with whether the "offending" director interlock helps or harms competition, or whether the extent of competitive overlap between the interlocked firms is massive or trivial. In so holding, the majority's opinion fails even to acknowledge what Commissioner Clanton correctly characterizes as the "potentially harsh effects" of a Section 8 strict *per se* rule (Clanton Statement at 1.)[1] much less make any effort to avoid them. The majority concludes that Congress and the courts leave this Commission no alternative but to strike down the interlock in this case because at the time the complaint issued in November 1978, Borg-Warner and Bosch U.S. were "competitors" in the sale of certain automotive aftermarket products. Section 8 condemnation must, reasons the majority, automatically ensue. [2]

Rather than adopting the majority's strict *per se* standard, I would follow the rule of the better-reasoned cases and hold that interlocks with an insignificant or "*de minimis*" effect on competition do not violate Section 8. I would therefore remand this matter to the ALJ to consider evidence of the likely competitive effect of the interlocks challenged here. I would also remand on the issues of whether Borg-Warner's post-oral-argument sale of the overlapping assets—coupled

* Commissioner George W. Douglas joins in this dissenting statement.

[1] The following abbreviations are used in this opinion:

Maj.Op.—Majority Slip Opinion
Bailey Op.—Separate Concurring Opinion of Commissioner Patricia Bailey
Clanton Statement—Concurring Statement of Commissioner David Clanton
ID-Initial Decision Page Number
IDF-Initial Decision Finding Number
Tr.-Transcript of Testimony Page Number

with the resignation of the individual directors—either moots this proceeding or makes issuance of any order unnecessary.

I. A STRICT PER SE RULE UNDER SECTION 8 IS UNNECESSARY AND UNWISE

I depart from the majority on several determinative issues. Most fundamentally, I cannot agree with the majority's unnecessarily expansive view that Section 8 mandates purposeful disregard of the competitive effects of the challenged interlock. I find the wording of Section 8 consistent with considering competitive effects; the legislative history internally contradictory but equally supportive of conclusions contrary to those embraced by the majority; and the case law on the critical issues sparse, conflicting, and indeterminative. Moreover, I view the interpretation of Section 8 as a strict *per se* statute to be inconsistent with sound application of antitrust policy.

A. *The Language of Section 8 Is Vague And Does Not Require A Strict Per Se Result*

It is a desirable attribute of our political system that Commissioners—like other adjudicators—have limited power. We are constrained in our adjudications by the wording of the laws we are charged to apply and interpret. Nevertheless, to the extent the language of Congress permits, our goal in interpreting and applying the antitrust laws should be to discourage anticompetitive and inefficient practices that diminish consumer welfare on the one hand, and to encourage procompetitive and efficient practices on the other. Where the language of a statute leaves no choice but to reach an anticompetitive, inefficient, or otherwise harsh result in a pending litigation, it becomes our unhappy duty to apply the law as mandated. But it is for Congress to place us in that situation. Absent specific legislative command, we need not—and should not—presume that [3] Congress intended to condemn the beneficial and the harmless together with the pernicious.

One irony of the majority's decision is that it renders unlawful under Section 8 of the Clayton Act the sharing by two competing firms of one director even in situations where it would be lawful under Section 7 of the same statute for the two firms to merge completely and share an entire board of directors. Further, it does so even if the interlocked firms each produce but an infinitesimal fraction of the relevant industry's output. Since these two sections were adopted simultaneously by the same Congress, I believe it abundantly clear that the Commission and the courts should avoid stretching to reach such inconsistent (indeed, surprising) results unless that is what Congress clearly intended.

To determine precisely what legislative command Congress has given the Commission and the courts in Section 8 cases, we must examine closely the disputed statutory provision. In pertinent part, Section 8 of the Clayton Act provides—as it did when enacted in 1914:[2]

> No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000 . . . if such corporations are or shall have been theretofore, by virtue of their business and location of operation, *competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.*[3] (Emphasis added)

The underscored portion is generally referred to as the "so that" clause, the focal point of the analysis of whether Section 8 embodies a *de minimis* exception or otherwise applies only to interlocks having (or likely to have) some minimal impact on competition. [4]

On its face the "so that" clause arguably contemplates at least some consideration of competitive effects, although a number of questions can be asked concerning the precise scope of the inquiry. For example, does the clause contemplate that all competition between the interlocked firms would b eliminated by agreement (as in a merger or a market or customer division), or simply one aspect of competition (as in an agreement to fix prices or to refrain from advertising)? Must there be a total elimination of competition, a substantial reduction in competition, or a minimal or even potential impact on competition? Does the clause require that the interlocked firms have sufficient combined market power to effectuate the "elimination"? Does "elimination of competition" refer only to competition between the interlocked firms, or does it mean elimination of all competition throughout the relevant market? Is the "so that" clause not intended as a conditional at all, but rather as a mechanism for bringing the interstate commerce requirement into play? The statutory language affords no ready answer to these questions.[4] [5]

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[2] *See United States v. Crocker National Corp.*, 656 F.2d 428, 431 n.1 (9th Cir. 1981) (comparing language of present and original Section 8), *rev'd on other grounds sub nom., BankAmerica Corp. v. United States*, 51 U.S.L.W. 4685 (U.S. June 8, 1983).

[3] 15 U.S.C. 19 (1973).

[4] Even commentators cited by Commissioner Bailey's concurrence (Bailey Op. at 12–13.) indicate the extent of the ambiguity created by the language of Section 8. Two years after Section 8 was enacted, one treatise addressed the meaning of the "so that" clause:

> It would be difficult to conceive a more uncertain and shifting standard of corporate conduct than this one, by which the question of what elimination of competition between two [interlocked] corporations by agreement would constitute a violation of the antitrust laws, is made the test of the lawfulness of [a competitor interlock].

J. Harlan & L. McCandless, *The Federal Trade Commission, Its Nature and Powers* 20 (1916). Similarly, ten years after Section 8's passage another commentator wrote:

> The difficulty in applying the test lay in the fact that no one could state with assurance under what circumstances the elimination of competition by agreement would constitute a violation of the anti-trust laws.

(footnote cont'd)

Uncertainty as to the meaning and purpose of the "so that" clause is reflected in the legislative history of Section 8. As discussed below, many of the Senators voting on the measure found the clause vague and imprecise. (Indeed, a number of Senators rejected criminal penalties for violations of Section 8 because it lacked the certainty required of criminal laws.[5]) Moreover, the first court to consider its meaning concluded that "the clause is not crystal clear," and accordingly turned to portions of the legislative history in an attempt at clarification.[6]

Resort to legislative history is always an uncertain undertaking, to be avoided if possible. But where the language of the statute is inescapably ambiguous,[7] the courts and the Commission have been forced to this sometimes dangerous and always imperfect source of legislative intent. I am generally wary of placing great reliance upon legislative history, dependent as it is upon individual or committee (rather than majority) expressions of opinion. However, where, as here, a line of case law has developed in an unfortunate direction on the basis of an incomplete interpretation of the legislative history,[8] further resort to that history would seem justified to right the wrong. [6]

B. *The Legislative History Of Section 8 Neither Requires Nor Supports A Strict Per Se Rule*

The Senate and House Judiciary Committee Reports[9] provide little insight into the Congressional intent behind Section 8. Both cite an address by President Wilson to Congress inveighing against trusts in general and interlocks in particular. Neither sheds much light on the intended extent of the interlock prohibition.[10] The conference [7] com-

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G. Henderson, *The Federal Trade Commission, A Study In Administrative Law and Procedure*, 38–39 (1924).

[5] *See* page 12 below.

[6] *United States v. Sears, Roebuck & Co.*, 111 F. Supp. 614, 617 (S.D.N.Y. 1953). The paragraph of Section 8 containing the "so that" clause is not the only unclear aspect of Section 8. *See, e.g., SCM Corp. v. FTC*, 565 F.2d 807, 809–10 (2d Cir. 1977), *cert. denied*, 449 U.S. 821 (1980) (in concluding Section 8 applies to corporations as well as to individual directors, the court said, "It is true that if the language of the section is considered alone, the result is not clear"), *remanding on other grounds, Kraftco Corp., et al.*, 89 F.T.C. 46, 61–62 (1977) ("the language of Section 8 read *in vacuo* perhaps leaves some doubt as to the entities its proscription is intended to cover").

[7] *See, e.g., United States v. Universal C.I.T. Corp.*, 344 U.S. 218, 221 (1952) ("we may utilize, in construing a statute not unambiguous, all the light relevantly shed upon the words and the clause and the statute that express the purpose of Congress").

[8] *See* discussion of *United States v. Sears, Roebuck & Co.*, 111 F. Supp. 614 (S.D.N.Y. 1953) in Part I(C) below.

[9] S. Rep. No. 698, 63d Cong., 2d Sess. (1914) (hereafter "Sen. Jud. Rep."); and H.R. Rep. No. 627, 63d Cong., 2d Sess. (1914).

[10] *Accord, United States v. Sears, Roebuck & Co.*, 111 F.Supp. 614, 616 (S.D.N.Y. 1953).

Among the segments of legislative history relied upon by Commissioner Bailey's concurring opinion to support the view that Congress intended a strict *per se* test to apply is the following quotation from the Senate Judiciary Committee's Report summarizing the Clayton Bill:

> Among other of these trade practices which are denounced and made unlawful may be mentioned . . . interlocking directorates.

Bailey Op. at 9, *quoting* Sen. Jud. Rep. at 1. However, the portion that is omitted from the quoted excerpt is also instructive. The full quotation is as follows:

> Among other of these trade practices which are denounced and made unlawful may be mentioned *discrimina-*

(footnote cont'd)

mittee report is silent on the scope of Section 8 with respect to competitor interlocks in general, and on the meaning of the "so that" clause in particular.[11]

The House Report acknowledges the committee's attempt to draft Section 8 so as to implement the recommendation of President Wilson that all interlocks be prohibited.[12] It is significant that the House Report makes no direct mention of any danger to competition posed by director interlocks. Indeed, the principal goal of Section 8 that might be gleaned from the report is a desire to promote President Wilson's goal of permitting "new blood" to enter the realm of corporate management, and thereby "immensely hearten the young men coming on."[13] The report also emphasizes a perceived need to check the "concentration of wealth, money, and property" under the control of "a few individuals or great corporations."[14] One of three sets of minority views included in the report states that Section 8 is "full of difficulty and peril" for small corporations, and would affect them in far greater degree than it would larger corporations.[15] It further declares:

> The use of interlocking directorates serves many useful purposes, and because in some instances it has been used to foster monopoly or create a restraint of trade, does not furnish a good reason why the use of interlocking directorates generally should be forbidden.[16]

However, the full House debated neither this question nor other relevant competitive issues.[17] [8]

The full Senate did debate the *per se* issue, and the record of that debate furnishes a guide to Congressional intent that must not be overlooked. The Senate Judiciary Committee reported the Clayton bill to the Senate floor, where one of the committee members—Sena-

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tion in prices for the purpose of wrongfully injuring or destroying the business of competitors; *exclusive and tying contracts; holding companies;* and interlocking directorates. (Sen. Jud. Rep. at 1, emphasis added.)

In the version of the Clayton Bill reported out of the Senate Judiciary Committee, only two of the omitted four practices (exclusive dealing and tying arrangements) were subject to the strict *per se* illegality standard that the majority is so intent on imposing upon competitor interlocks. *See* Sen. Jud. Rep. at 54–69. Moreover, in the final version of the Clayton Bill enacted into law (as well as under current antitrust law), *none* of the four omitted practices were outlawed under a strict *per se* rule. *See Id.* at 54–56, 60–61; 15 U.S.C. 13(a) (b), 14, and 18 (1976); *Tampa Electric Co. v. Nashville Co.*, 365 U.S. 320, 328–29, 333–35 (1961); and *Fortner Enterprises, Inc. v. United States*, 394 U.S. 495, 498–500 (1969) (*"Fortner I"*).

Thus, to the extent the quoted passage illuminates the meaning of the "so that" clause, it can only be interpreted as cutting against any intention by Congress to adopt a strict *per se* condemnation of competitor interlocks.

[11] H.R. Rep. No. 1168, 63d Cong., 2d Sess. 13–16 (1914). *See* note 18 below.

[12] H.R. Rep. No. 627, 63d Cong., 2d Sess. 18 (1914). *But see* note 57 below.

[13] H.R. Rep. No. 627, 63d Cong., 2d Sess. 18, 20 (1914).

[14] *Id.* at 19.

[15] *Id.* (Part 2, Minority Views) at 8.

[16] *Id.*

[17] 51 Cong. Rec. 9600–07 (1914). In the bill that ultimately became the Clayton Act, Sections 7 and 8 of the final Act were denominated Sections 8 and 9, respectively. Thus, the merger provision in the legislative history is Section 8, while the interlocking directorate section is Section 9. For convenience, I refer throughout this opinion to their final (and current) designation.

tor Cummins of Iowa—raised the subject of Sections 7 and 8. After stating his view of the policy embodied in the pending legislation, he read the relevant language of Section 8 as reported by the committee. This version was nearly identical to that adopted by the House,[18] and essentially the same as the present Section 8; it included both the $1 million corporate size threshold and the "so that" clause. (14,256.)[19] Senator Cummins believed those provisions were far too weak. He understood Section 8 to require proof "that a *consolidation* of the two corporations which are involved would be a violation of the antitrust law." (*Id,* emphasis added.) He went on to urge that:

> It ought to be unlawful for corporations that are engaged in competitive business to have a community of directors. It ought to be unlawful for any man to act as a director upon two corporations which are or ought to be competing with each other . . . (*Id.*)

The legislative history records no challenge to Senator Cummins' interpretation of Section 8 and his assessment of its worth. However, the course of the ensuing debate reveals that a majority of the Senators differed with his policy prescription.

During the ensuing floor debate, Senator Cummins introduced what was, in effect, a strict *per se* amendment deleting both the "so that" clause and the $1 million corporate [9] size exclusion, and extending the interlock prohibition to officers, as well as directors, of any firms "carrying on business of the same kind or competitive in character." (14,534.) Explaining his reasons for the amendment he stated that, under the original language, if an agreement "totally annihilating competition would *not* constitute a violation, then the [original] section would not apply." (14,535.) Senator Cummins maintained that the extra burden of proving that some agreement between the companies would violate existing law seriously weakened the interlock prohibition. (*Id.*) He also felt that Section 8, as reported, was a "half hearted and feeble way" to cure the perceived evil of interlocks. (*Id.*) It is difficult to see how a member of the reporting Senate committee could have taken such a position were it not clear that the original Section 8 provision was *not* a strict *per se* proscription of director interlocks.

A number of Senators spoke against the Cummins amendment, including other members of the Judiciary Committee. It is interesting that many of the reasons why strict *per se* condemnation of director interlocks is unwise antitrust policy today were advanced on the floor

[18] The Senate Judiciary Committee modified the "so that" clause by changing "*an* elimination of competition" to "*the* elimination of competition." Sen. Jud. Rep. at 48, 68. The full Senate approved the change, 51 Cong. Rec. 14,030–31 (1914), as did the subsequent conference committee. H.R. Rep. No. 1168, 63d Cong., 2d Sess. 14 (1914).

[19] Unless noted otherwise, parenthetical citations in the text refer to page numbers in Volume 51, Parts 13–16 of the Congressional Record, 63d Congress, 2d Session (July 22–Oct. 24, 1914).

of the Senate almost 70 years ago. These include the dangers of: impairing legitimate procompetitive business expansions;[20] reducing the number of [10] qualified directors available to corporations, especially to small firms;[21] discouraging investment and enterprise;[22] placing a premium on "dummy directors";[23] and increasing the difficulties confronting firms that are required to be incorporated in a state in order to do business there.[24]

Senator O'Gorman (N.Y.), another member of the Judiciary Committee, opposed the Cummins amendment as "unfortunate", arguing that the situation the amendment sought to remedy was already addressed adequately by the antitrust laws:

> [In the Clayton bill] we have supplemented the Sherman Antitrust Act; we have taken every reasonable step that is necessary to destroy monopoly; and, having done all that a suggestion is now made which is wholly unnecessary and which *can offer but a modicum of benefit while inflicting injury and imposing needless restraints upon American enterprise.* It is for this reason that I shall vote against the [Cummins] amendment. (14,540.) (Emphasis added)

Senator Chilton (W. Va.), still another Judiciary Committee member, explicitly opposed the strict *per se* approach in the amendment, saying: [11]

> That which experience teaches is necessary to legitimate success and which enables the enterprising man to expand his business *should not be made unlawful per se but only when it is made or becomes the handmaiden of monopoly or the restraint of trade.* (14,539–40.) (Emphasis added)

The arguments advanced by supporters of the Cummins amendment are also inconsistent with the Commission majority's conclusion

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[20] *See* remarks of Sen. Hitchcock (Neb.) (14,535.) (expressing concern that *per se* amendment might destroy or impair great deal of legitimate business expansions, citing wholesale grocery industry); Sen. Overman (14,536.) (same as to expansion of cotton mills via new incorporations with new boards sharing common directors); Sen. Lippit (14,536.) (interlocking directorates created by geographic expansions can be procompetitive and not dangerous); and Sen. Walsh (14,536.) (same, indicating preference for less restrictive rule than Cummins proposal). Senators Overman and Walsh were members of the Judiciary Committee.

[21] *See* remarks of Sen. Lippit (R.I.) (14,538.) (directors described as scarce source of efficiency; since sufficient number of independent, qualified persons are unavailable, ban on interlocks would detract from quality of many boards and could impair efficiency of all small corporations). *See also* Halverson, *Should Interlocking Director Relationships Be Subject To Regulation And, If So, What Kind?*, 45 Antitrust L.J. 341, 346 (1976) ("The realities of today's corporate world require that interlock regulation not be so severe as to diminish further the pool of qualified individuals who are willing to serve as outside directors"; cites recent business publication as indicating "individuals on the margins of [Section 8's] scope are expressing concern about accepting positions on corporate boards where the existence of competitive overlap is merely *de minimus* [sic]"); Note, *Interlocking Directorates and Section 8 of the Clayton Act*, 44 Alb. L. Rev. 139, 155 (1979) ("Interlocks involving outside directors may yield advantages in terms of corporate productivity that outweigh any possible dangers of anticompetitive abuse, especially if there is a shortage of qualified 'expert directors' in a particular field").

[22] *See* remarks of Sen. Smith (Mich.) (14,538.) (citing numerous Michigan industries with interlocking directorates, Cummins' amendment called "a sweeping, a far-reaching, and an undesirable amendment, and it ought not be adopted").

[23] *Id.*

[24] *See* remarks of Sen. Chilton (W.Va.) (14,540.) (citing requirements in oil and coal industry, reincorporation in new states described as "beneficial process").

that Section 8, as ultimately enacted, was intended as a strict *per se* statute. For example, Senators Reed (Mo.) (Judiciary Committee member) and Jones (Wash.) both supported the amendment because they favored the proposal advanced by President Wilson and the Democratic platform—that *all* interlocking directorates be prohibited. (14,539–41.) Far from providing a clear-cut prohibition of all interlocks, Senator Jones viewed the provisions of Section 8 as "uncertain, indefinite, and ambiguous in terms and possible effect. We do not know what they mean." (14,542.) He further despaired that "The suggestions of the President were wise. We would have done well to follow them. We have not done so." (*Id.*)

With these words the Senate debate on the Cummins amendment ended. The amendment was defeated 15–44 (37 not voting). (14,543.) Of the 18 Judiciary Committee members,[25] 10 voted against the amendment (including the Committee's chairman) and only three voted for it (the remainder abstained). (*Id.*) The meaning of this segment of the legislative history of Section 8 is not without ambiguity. For example, it is unclear whether Senators arguing and voting against the Cummins amendment did so because they supported retention of the "so that" clause, the $1 million corporate size exception (or both), or for other reasons. But this ambiguity is sufficient to disprove the premise underlying today's majority opinion that the legislators clearly intended a strict *per se* proscription. [12]

It is reasonably apparent from this legislative history that the Cummins amendment was rejected because a majority opposed applying a strict *per se* rule to interlocking directorates. As the Senate floor debate reveals, the committee reporting the bill did not understand that Section 8 would be construed as a strict *per se* prohibition, since a majority of Judiciary Committee members voted against the Cummins amendment. Moreover, the above-described floor debate involving the Committee's membership indicates that the bill was intentionally flexible.

This legislative history reveals that the legislators were well aware of the resulting uncertainties in Section 8. Indeed, it is clear that, for a number of Senators, this uncertainty was a primary reason for the decision to remove criminal penalties from Section 8. For example, Senator Cummins concluded that he was against a criminal penalty in Sections 7 and 8 on the "ground that neither of them furnishes a rule of conduct, neither of them furnishes a standard that can be applied with that certainty that all criminal laws ought to be applied." (14,328; *see also* 14,254 and 14,325.) In the course of a debate on whether Sections 7 and 8 should be criminal provisions, Senator

[25] Amendments to Sherman Antitrust Law and Related Matters: Hearings on H.R. 15657 Before Subcomm. of the Senate Comm. on the Judiciary, 63d Cong., 2d Sess. (1914).

Chilton pointed out the danger that harsh penalties coupled with an ambiguous prohibition could create, stating, "We want to stop interlocking directorates as far as we can. But we . . . . do not want to destroy or to frighten legitimate business". (14,327.)

Treating Section 8 as encompassing a *de minimis* exception is not only more consistent with the specific legislative history, but also with the competitive concerns which underlay the enactment of the antitrust laws in general. For example, when the Clayton bill was reported from the House-Senate conference committee, debate ensued over whether addition of the words "may be" (substantially to lessen competition) and "or tend to" (create a monopoly) in Section 7[26] had weakened the bill. Senator Walsh (Mont.) **[13]** defended these changes, noting that there is little difference between finding that competition has been damaged substantially and demonstrating that commerce restrained by any violation was more than *de minimis*. He expressed the common understanding that the Sherman Act was not intended to reach *de minimis* violations and that *de minimis* is understood in terms of competitive effect:

> The Sherman Act denounces all combinations in restraint of commerce, but no combination falls under the ban of the statute unless *commerce is restrained* to a "substantial" extent. *De minimus [sic] non curat lex.* (16,149.)[27]

In short, contrary to the Commission majority's position that "Implicit in the statute's million-dollar net worth requirement and explicit in the legislative history of Section 8 is the judgment of Congress that the size of the interlocked corporations is the crucial *de minimis* inquiry" (Maj.Op. at 23.), the legislative history of Section 8 provides ample support for the conclusion that it was designed to permit benign competitor **[14]** interlocks. Numerous statements made during

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[26] The effect of the conference committee's changes was to insert the bracketed terms into, and delete the stricken terms from, the Senate version of Section 7:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition [may be] substantially [to] lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, [or to restrain such commerce in any section or community,] or [tend] to create a monopoly of any line of commerce.

Sen. Jud. Rep. at 60; H.R. Rep. No. 1168, 63d Cong., 2d Sess. 3 (1914).

[27] Senator Walsh went on to cite an example of the consequences of not requiring some substantial injury to competition:

> How much reason there is to dread disastrous results from such a construction is exhibited by the decision in the *Union Pacific-Southern Pacific* case, in which the traffic affected by the combination amounted only to eighty-eight one-hundredths of 1 per cent of the total tonnage of the Southern Pacific. Yet the court held that the restraint of trade was substantial enough to bring the combination under the condemnation of the law. (16,149.)

See United States v. Union Pacific Railroad Co., 226 U.S. 61, 88 (1912) ("while these roads did a great deal of business for which they did not compete and . . . the competitive business was a comparatively small part of the sum total of all traffic, state and interstate, carried over them, nevertheless such competing traffic was large in volume, amounting to many millions of dollars").

the Senate debate as to the intended flexibility of the statute, the uncertainties connected with enforcement, and the competitive inquiry inherent in a *de minimis* analysis, all tend to support the view that those who enacted Section 8 did not intend it to apply solely on the basis of a clearly articulated dollar cutoff point. Rather, it was intended to contain enough flexibility to preserve interlocks where they are useful and beneficial while prohibiting those likely to threaten competition.

C. *The Case Law Is Mixed And Does Not Dictate A Strict Per Se Rule Under Section 8*

Contrary to the impression left by the majority's opinion today, the courts have not conclusively resolved the *per se/de minimis* question. In approaching this issue, it is important to keep three facts in mind. First, as noted, the language of Section 8 itself is unclear and susceptible of alternative interpretations. Second, only a handful of courts have ever considered the issue. And third, the Supreme Court has never decided or even considered the meaning of the "so that" clause or the existence of a *de minimis* exception to Section 8.

It is also important to distinguish among *per se* illegality, the *de minimis* concept, and the $1 million corporate size exemption in Section 8. These concepts need not be mutually exclusive. The strict *per se* approach the majority endorses apparently forecloses any consideration of competitive effects. However, the better approach in construing Section 8 would be to require establishing a threshold factual predicate—that the competitive effects of the interlock at issue are likely to be non-trivial—before imposing liability, *per se* or otherwise. A *de minimis* exception simply means that if the *competitive* impact of the interlock can readily be shown to be *de minimis*—most appropriately viewed in terms of the extent and nature of the competitive overlap, not the size of the allegedly interlocked firms—no violation has occurred.

One need not do an exhaustive rule of reason or Section 7 analysis in all (or even most) cases to determine whether any such competitive overlap would be trivial. Thus, a [15] *de minimis* exception does not vitiate the *per se* rule; the two can logically co-exist. If annual industry sales could be shown to be $100 million, for example, and the two interlocked firms' combined overlapping sales were shown to be $1,000, or if overlapping sales constituted only a minute fraction of each firm's revenue, it should be reasonably clear that an exhaustive rule of reason analysis would not be required to determine that the competitive overlap was *de minimis* and that no Section 8 liability should attach. Under the majority's decision, of course, liability would exist. Finally, the *de minimis* principle does not relate to corporate size;

instead, it relates to competitive effects. Section 8's $1 million corporate size limitation is therefore not properly viewed as one demarcating what constitutes *de minimis* competition.

The legislative history outlined above has not been examined closely in most Section 8 cases. Only two of the cases that have considered the "so that" clause have examined Section 8's legislative history in any detail—*United States v. Sears, Roebuck & Co.*[28] and *United States v. Crocker National Corp.*[29] Because the holding and analysis in *Sears* has formed the basis for virtually all subsequent precedent on the "so that" clause, I begin my discussion of the case law there.

The district court in *Sears* concluded generally that "a fair reading of the legislative debates leaves little room for doubt" that Congress enacted Section 8 to reach "incipient" antitrust violations.[30] However, with respect to the meaning of the "so that" clause, the court concluded:

> [t]he legislative history of §8 is inconclusive on the precise question before [the court]. It affords no [16] evidence permitting progress from speculation toward certainty. (Emphasis added)[31]

Elsewhere, in discussing whether the "so that" clause meant an interlock was unlawful under Section 8 only if a "consolidation" or merger of the corporations would violate the antitrust laws, the *Sears* court stated:

> We can, therefore, do no more than speculate as to whether or not it was the sense of Congress that §8 invoked only the consolidation test.[32]

The court briefly discussed the debate over Senator Cummins' amendment, and the fact that Cummins characterized the proposed Section 8 language as a restatement of the Section 7 test. The judge declined to speculate whether the Senators expressed agreement or disagreement with Senator Cummins' characterization. The vote to reject the Cummins amendment, according to the court, could have meant that the Senators believed that the Cummins amendment added nothing to the reported bill and was hence unnecessary.

As shown above, however, the floor debate tells a different story. To the Senators of the Sixty-Third Congress, the Cummins amendment seems to have presented an unwanted tightening of the law that was rejected because they did not want to prohibit competitor interlocks

[28] 111 F.Supp. 614 (S.D.N.Y. 1953).

[29] 656 F.2d 428 (9th Cir. 1981), *rev'd sub nom., BankAmerica Corp. v. United States*, 51 U.S.L.W. 4685 (U.S. June 8, 1983).

[30] 111 F.Supp. at 616.

[31] *Id.* at 619.

[32] *Id.* at 618.

entirely. Moreover, it is reasonable to infer that the majority voting against the Cummins amendment did not agree with President Wilson's view that all competitive interlocks are harmful. Rather, the prevailing view seems to have been that efficiencies were available through interlocking directorates, and that only when those relationships created a danger to competition would they be prohibited by the antitrust laws. Finally, the legislative history does not establish that the Senators' desire for flexibility was satisfied by the $1 million minimum corporate size exemption. The numerous examples of procompetitive business expansions carried no such qualification. [17]

The *Sears* court concluded that a *per se* analysis is applicable to Section 8 cases.[33] Nevertheless, the court also recognized a *de minimis* exception—as the majority concedes (Maj. Op. at 23 n.23.)—when it stated:

> Surely the [overlapping] sales of $80,000,000 do not come within the de minimus [sic] principle.[34]

This statement, made in the context of the amount of interstate commerce affected by the interlock,[35] illustrates that the first court to construe Section 8—in a decision described by the majority as "The leading case interpreting the 'so that' clause" (Maj. Op. at 26 n.26.)—was unwilling to go as far in extending the reach of Section 8 as is the majority today.

The *de minimis* exception recognized in *Sears* was applied in a 1966 district court decision involving several facts similar to this case. In *Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co., Inc.*,[36] the court—citing *Sears*—held that "*De minimis competition* is not encompassed by the proscription of §8."[37] Applying that standard, the *Paramount* court concluded that any direct competition between the defendant corporations and Paramount in the various types of entertainment products and services alleged by plaintiffs was *de minimis*, and dismissed the complaint on that basis (as well as on alternative grounds, including mootness). [18]

In my judgment, this *de minimis* rule makes far more sense as a matter of antitrust policy than the doctrinaire approach taken by the

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[33] *Id.* at 617, 620–21. *See* Travers, *Interlocks in Corporate Management and the Antitrust Laws*, 46 Tex. L. Rev. 819, 839–40 (1968) (noting that "prior to the first judicial construction of [Section 8 in *Sears*], considerable doubt existed whether the statutory language would permit a construction of *per se* illegality"; *Sears* court described as employing "an ingenious constitutional argument" to avoid giving the "so that" clause substantive meaning as qualification of term "competitors").

[34] 111 F.Supp. at 621.

[35] The *Sears* court appears to have recognized the *de minimis* exception as arising from the restrictions of the commerce clause. Of course, the "so that" clause discussed above provides substantial support in and of itself for a *de minimis* exception.

[36] 1966 Trade Cas. (CCH) ¶71,678 (S.D.N.Y. 1966).

[37] *Id.* at p. 82,065 (emphasis added).

majority today. Moreover, there is ample case support for this position. As the ALJ in this matter stated in weighing arguments for and against a *de minimis* exception, "Precedent may be found to support either position." (ID 47.) Unfortunately, as the ALJ also found,

> The record does not permit quantification with any degree of precision as to the overlap in the sale of import car parts in the relevant product lines to domestic [warehouse distributors] by Borg-Warner and Bosch U.S. (ID 46.)

Hence, I would remand this matter to the ALJ for consideration of whether the competitive overlap that formerly existed between the corporate respondents was *de minimis*. If the evidence established that it was, I would dismiss the complaint.[38]

In *United States v. Crocker National Corporation*,[39] the other case besides *Sears* to review the legislative history of the "so that" clause in any depth, the principal issue was whether Section 8 prohibited director interlocks involving banks, bank holding companies, and insurance companies. In the course of holding the interlock to be within the ambit of Section 8 (a determination the Supreme Court subsequently rejected), the court asserted (without citation):

> The initial formulation of the bar against interlocking directorates between competing corporations rested on the premise that elimination of competition between the corporations was to be presumed from the very existence of common directors. This remained the essence of the prohibition.[40] **[19]**

Several points bear mentioning in connection with this statement by the Ninth Circuit. First, the Supreme Court has recently reversed the Ninth Circuit decision in *Crocker*, concluding that Section 8 was not intended to cover interlocking directorates between banks and nonbanks (such as insurance companies).[41] Second, while the court of appeals affirmed the *per se* nature of Section 8 violations,[42] it was not faced with and did not reach the *de minimis* issue, since the parties had stipulated they were competitors and that the competition between them was "not insubstantial." Moreover, the defendant companies "waived any defense that the elimination of this competition by

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[38] The *de minimis* exception recognized by both the *Sears* and *Paramount* courts—and applied by the latter court to reject a finding of Section 8 liability—is the very approach that I propose the Commission adopt under Section 8. Thus, Commissioner Bailey is incorrect in asserting that "The dissenters have found no case that takes their contrary view." (Bailey Op. at 1.) Indeed, even the majority opinion concedes that "Courts nevertheless have disagreed about whether Section 8 forbids interlocking directorates if only a *de minimis* amount of commerce is involved." (Maj. Op. at 24.)

[39] 656 F.2d 428 (9th Cir. 1981), *rev'd on other grounds sub nom., BankAmerica Corp. v. United States*, 51 U.S.L.W. 4685 (U.S. June 8, 1983).

[40] 656 F.2d at 438.

[41] *BankAmerica Corp. v. United States*, 51 U.S.L.W. 4685 (U.S. June 8, 1983).

[42] 656 F.2d at 438, *citing TRW, Inc. v. FTC*, 647 F.2d 942, 947 (9th Cir. 1981), and *United States v. Sears Roebuck & Co.*, 111 F.Supp. 614, 616–17 (S.D.N.Y. 1953).

agreement among them would not violate the antitrust laws."[43] Further, the court in *Crocker* made passing reference to the *Paramount* court's application of the *de minimis* exception, and gave no indication that it was rejecting that approach.[44]

However, the Ninth Circuit did address the *de minimis* exception a few months earlier in *TRW, Inc. v. FTC*.[45] In that case, interpreting the "so that" clause for the first time,[46] the Ninth Circuit asserted that in establishing a Section 8 offense, "proof that the interlock has an actual anticompetitive effect is not required,"[47] and, further, that "a *de minimis* exception is not contemplated by [Section 8]."[48] **[20]**

In concluding that "The statute contains nothing that suggests a requirement of some substantial quantum of competition,"[49] the Ninth Circuit appears to have discarded all other plausible interpretations of the ambiguous "so that" clause but its own.[50] In any event, the Ninth Circuit's holding in *TRW* that there was no *de minimis* exception was arguably unnecessary to its conclusion. In its own decision in *TRW* in 1979, the Commission wisely refrained from deciding the issue unnecessarily, holding simply that if there were a *de minimis* exception to Section 8, the respondents in that case failed to prove it applied to them.[51] Had the question been so clear as the majority implies today, one suspects that the Commission would have so indicated in its *TRW* decision.

The final "so that" clause case relied upon by the majority to support its strict *per se* conclusion is *Protectoseal v. Barancik*,[52] in which in its first Section 8 case the Seventh Circuit appeared to apply a *per se* standard. However, for several reasons *Protectoseal* affords little support for a *strict per se* rule. First and most important, the Seventh Circuit did not reach the *de minimis* issue, since it was alleged by the plaintiff (in a summary judgment context) that the interlocked firms together accounted for 50 percent of the market in which they com-

[43] 656 F.2d at 433.

[44] *Id.* at 451 n.81.

[45] 647 F.2d 942 (9th Cir. 1981).

[46] *Id.* at 946.

[47] *Id.* at 947. The sole authority cited for this proposition is a 1973 decision by the Seventh Circuit in *Protectoseal Company v. Barancik*, 484 F.2d 585 (7th Cir. 1973), discussed below, which adopted essentially a *per se* approach but did not reach the *de minimis* issue.

[48] 647 F.2d at 948.

[49] *Id.*

[50] In construing the "so that" clause to preclude a *de minimis* exception, the *TRW* court cited the 1940 *Socony-Vacuum* decision's *per se* rule against horizontal price fixing, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221–23 (1940), as somehow showing that Congress by enacting the "so that" clause in *1914* "plainly meant to reach interlocks between competitors without regard to the amount of commerce that might be restrained." 647 F.2d at 948. However, one of the two district court cases cited by the *TRW* court for this proposition was *Sears*, which itself expressly recognized a *de minimis* exception to Section 8. (The second was the district court's decision in *Crocker*, now reinstated by the Supreme Court.)

[51] *TRW, Inc., et al.*, 93 F.T.C. 325, 385–86 (1979), *aff'd in part*, 647 F.2d 942 (9th Cir. 1981).

[52] 484 F.2d 585 (7th Cir. 1973).

peted.[53] Second, *Protectoseal* itself cited for [21] support only the 1953 *Sears* case (recognizing a *de minimis* exception).[54] And third, the Seventh Circuit's conclusion as to the legal standard was based upon an apparent misreading of the critical language of the "so that" clause. In concluding that the language of the clause "implies that a market-wide analysis of competition is unnecessary",[55] the court of appeals was construing its own inaccurate quotation of the clause that omitted the bracketed words:

> They must be "competitors, so that the elimination of competition [by agreement] between them would constitute a violation of the provisions of any of the antitrust laws."[56]

Thus, with respect to its "market-wide analysis" holding, the *Protectoseal* court appears to have misread Section 8's "so that" clause to refer to *competition* between the interlocked competitors, rather than to competition in the relevant market being eliminated *by agreement* between them. Its resulting conclusion on the legal standard intended by Congress should be discounted accordingly.

The majority relies heavily on this uncertain precedent in rejecting respondents' contention that the "so that" clause imposes any sort of *de minimis* limitation on Section 8 (Maj. Op. at 24–27). The decision cites *TRW* and other cases that construe the clause to be satisfied if price-fixing or other *per se* arrangements among the competing interlocked firms would be illegal. (*Id.* at 26–27.) However, at the time Section 8 was enacted, the Supreme Court had not yet adopted at least some of the strict *per se* rules that the majority invokes in its interpretation of the "so that" clause. (*Id.* at 25–26.) Moreover, the majority's reliance on the *per se* rule against price fixing is arguably not consistent with the express terms of the "so that" clause, since such agreements do not result in the "elimination" of all competition between the conspirators, but only price [22] competition.[57]

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[53] *Id.* at 587.

[54] *Id.* at 588.

[55] *Id.* at 589.

[56] *Id.* at 588.

[57] One further indication of the inappropriateness of the majority's construction of the "so that" clause is the vertical character of the very *per se* rule of illegality that this same Commission majority recently applied in its *Russell Stover* decision. The majority restated its view in that case that a manufacturer's setting of prices for resale of its goods by distributors was a *per se* offense under the antitrust laws. The same majority's construction of Section 8 in this case would seem to make "competitors" of a manufacturer and a distributor whose contract of sale contains resale price maintenance provisions, because (to paraphrase the "so that" clause) "the elimination of [intrabrand price] competition by agreement among them would violate [one] of the provisions of the antitrust laws." *See Russell Stover Candies, Inc.*, 3 Trade Reg. Rep. (CCH) ¶21,933 (July 1, 1982) at p. 22,370 [100 F.T.C. 1], *appeal docketed, Russell Stover Candies, Inc. v. FTC*, Civil No. 82–2036 (8th Cir., argued April 11, 1983).

It is interesting to note that President Wilson actually urged that director interlocks between firms in buyer-seller relationships be prohibited. *See* H.R. Rep. No. 627, 63d Cong., 2d Sess. 18 (1914). However, the legislative history and subsequent case law clearly indicates that Section 8 was intended to reach only horizontal interlocks. *See, e.g., Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co., Inc.*, 1966 Trade Cas. (CCH) ¶71,678 at p. 82,064 (S.D.N.Y. 1966) ("Only horizontal relationships are covered"); *BankAmerica Corp. v. U.S.*, 51 U.S.L.W. 4685

(footnote continued)

Further, the majority and Commissioner Bailey are both incorrect in asserting that any agreement between any two or more competitors that fixes a price will inevitably violate the antitrust laws, thus satisfying the "so that" clause. (Maj.Op. at 26; Bailey Op. at 12.) The Supreme Court has made clear that, in some joint ventures and certain other situations in which competitors combine to produce a different product that individual competitors cannot market effectively, a horizontal agreement setting a price may not be a "naked" restraint of trade lacking any purpose except the stifling of competition.[58] The Court has explained that such conduct may be ancillary to a practice [23] having redeeming competitive virtues and, in such cases, competitors' price-related agreements will be lawful under the rule of reason if, on balance, they do not restrain trade unreasonably.[59]

Thus, upon close inspection, the court decisions that have addressed Section 8 of the Clayton Act do not inevitably require imposing strict *per se* liability in this case. Although one line of case law would *permit* strict *per se* condemnation of interlocks between competing corporations, nothing in those cases *prohibits* the Commission from considering competitive effects in Section 8 cases. Moreover, a second line of cases supports the better-reasoned approach—embodied in *Paramount*—that treats likely competitive effects as an important issue under Section 8.[60] As I discuss next, sound antitrust policy dictates that the Commission has a responsibility to follow the second, more legally and economically sound approach.

(U.S. June 8, 1983) at 4687 ("competing corporations" paragraph of §8 "does not bar . . . any kind of vertical interlock"). Thus, in the vertical as well as the horizontal area, Congress was willing to depart from President Wilson's doctrinaire position to achieve a more sensible policy result. *See* Halverson, *Interlocking Directorates—Present Antitrust Enforcement Interest Placed in Proper Analytical Perspective*, 21 Vill. L. Rev. 393, 398 (1975–76) ("the legislation which emerged from Congress was more limited in scope than [Wilson] had envisioned. Section 8 of the Clayton Act only covered director interlocks between competitors, and thus fell far short of the objective President Wilson had in mind").

[58] *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 23 (1979) ("Joint ventures and other cooperative arrangments are . . . not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all").

[59] *Id.* at 8–10, 19–24 (agreement among competing members of composers' association to grant non-exclusive blanket license to copyrighted musical compositions at fees negotiated between association and buyer-television network not "naked" restraint, but must be judged under rule of reason), *complaint dismissed on remand, CBS v. ASCAP*, 620 F.2d 930 (2d Cir. 1980) (blanket license held lawful under rule of reason), *cert. denied*, 450 U.S. 970 (1981), *reh'g denied*, 450 U.S. 1050 (1981).

[60] Commissioner Bailey's assertion that the Commission majority, in adopting a rule of strict *per se* liability, is simply following the holdings of "virtually all decided cases" (Bailey Op. at 17.) is not supportable. As explained in the text, only five court cases have ever construed the meaning of the "so that" clause as it applies to the instant matter. Of those, only *TRW* concluded there was no *de minimis* exception to the *per se* standard, while *Sears* and *Paramount* recognized such an exception. As noted above, the parties had stipulated the *de minimis* issue out of the case in *Crocker*, and the Ninth Circuit's decision was recently reversed by the Supreme Court in *BankAmerica*. Moreover, not only did the *Protectoseal* court not reach the *de minimis* question, its conclusion that no market-wide analysis of competition is necessary was apparently based upon a misreading of the language of the "so that" clause, as explained above. Thus, while two cases support the dissent's position, only one case directly supports the majority's approach.

D. *A Strict Per Se Rule Under Section 8 Is Unsound Antitrust Policy*

To say that Section 8 should not be construed as a strict *per se* statute is not to argue that establishing a Section 8 violation requires proof that a merger of the interlocked firms would be unlawful under Section 7 of the Clayton Act. That argument [24] has been expressly rejected by at least two courts.[61] Moreover, in other cases in which both Section 7 and Section 8 violations were alleged, the courts have analyzed the two provisions separately.[62] I agree that had Congress intended an *identical* legal standard to be used for Sections 7 and 8, presumably it would have used identical wording in each section. It did not. However, it does not follow from this that Congress intended a strict *per se* standard under Section 8 that would preclude *any* consideration of competitive effects. To say that Congress intended that no full-blown rule of reason or Section 7 analysis be required in Section 8 cases does not lead inescapably to a rule of *per se* illegality whenever competitors share a director. Thus, I do not urge that a full rule of reason analysis is required to find a Section 8 violation. Rather, I argue simply that before an interlock between competitors is condemned, some abbreviated form of analysis sufficient to determine that the likely competitive effect of the interlock is not *de minimis* should be conducted.

Throughout its historical evolution, antitrust case law has developed varying legal standards. Viewed from one perspective, these might be thought of as falling along a continuum that includes standards ranging from *per se* illegality;[63] to *per se* illegality once certain factual predicates are proven;[64] to the truncated or so-called "quick look" [25] rule of reason that considers whether any possible procompetitive justifications might exist and, if not, condemns the generally anticompetitive practice;[65] to the full-blown rule of reason, which

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[61] *Protectoseal Co. v. Barancik*, 484 F.2d 585, 588–89 (7th Cir. 1973); *United States v. Sears, Roebuck & Co.*, 111 F.Supp. 614, 616–20 (S.D.N.Y. 1953).

[62] *See, e.g., Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195 (2d Cir. 1978); *American Medicorp, Inc. v. Humana, Inc.*, 445 F.Supp. 573 (E.D. Pa. 1977); *United States v. Cleveland Trust Co.*, 392 F. Supp. 699 (N.D. Oh. 1974), *aff'd mem.*, 513 F.2d 633 (6th Cir. 1975).

[63] *See, e.g., Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (per curiam) (agreement among competing beer wholesalers to fix credit terms by requiring retailers to pay in advance or upon delivery conclusively presumed *per se* illegal price fixing; further examination under rule of reason unnecessary).

[64] *See, e.g., Fortner Enterprises, Inc. v. United Steel Corp.*, 394 U.S. 495, 498–500 (1969) (*"Fortner I"*); and *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 608–14 (1953) (*per se* rule against tie-ins applied only where one product is tied to a second, seller has sufficient economic power in tying product market, and not insubstantial amount of commerce in tied product market is involved). *Cf. Goldfarb v. Virginia State Bar*, 421 U.S. 773, 781–83, 786 n.16 (1975) ("naked" agreement among competing members of state bar association to adhere to minimum-fee schedule for residential real estate title searches found to be "classic illustration" of price fixing, though *per se* label not expressly invoked; in finding effect on prices "plain" and "unusually damaging", Court considered level of adherence to, and enforcement of, challenged agreement, and cited apparent anticompetitive purpose).

[65] *See, e.g., National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978) (agreement among competing members of engineers' society to abide by ethics rule prohibiting discussion of prices with potential

(footnote cont'd)

considers all possible pro- and anticompetitive justifications and effects of the challenged practices;[66] and finally even to the "*per se* legality" that is judicially conferred in extraordinary cases.[67] Thus, even if one were to accept the majority's conclusion that "a *detailed* examination of size of industries, size of corporations, percentage of sales, or volumes of commerce is not properly a part of an adjudicative case under Section 8" (Maj.Op. at 23 n.23, emphasis added.), antitrust precedent furnishes ample flexibility for the abbreviated competitive analysis—short of [26] the full rule of reason standard—that I would adopt under Section 8.

Even assuming the majority today chooses to apply a rule of strict *per se* illegality as a matter of antitrust policy, rather than because it feels required to do so, its actions do not meet the requisite standard for applying a *per se* rule. That test was recently reiterated by the Supreme Court in the 1979 *Broadcast Music* case:

> More generally, in characterizing [the challenged] conduct under the *per se* rule, our inquiry must focus on whether the effect and, here because it tends to show effect, . . . the purpose of the practice are to threaten the proper operation of our predominantly free market economy—that is, whether the practice facially appears to be one that would *always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive.*" (Emphasis added, citation omitted.)[68]

Measured against this standard, the majority's conclusion as to the *per se* illegality of director interlocks between competing firms regardless of the *de minimis* competitive impact the interlock might involve

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customers until after initial selection of engineer, while not price fixing as such, requires no elaborate industry analysis to demonstrate anticompetitive character; agreement held unlawful after extensive discussion—and rejection—of proffered "public safety" defense under rule of reason). *But cf. Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (describing agreement challenged in *Professional Engineers* as "unlawful without requiring further inquiry").

[66] *See, e.g., Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) (agreement among competing members of composers' association to grant nonexclusive blanket license to copyrighted musical compositions at fees negotiated between association and buyer-television network not "naked" restraint lacking any purpose except stifling competition, thus *per se* rule not invoked; citing factors including integration of various services within blanket licensing system—resulting in "substantial lowering of costs"—Court remands for "a more discriminating examination under the rule of reason"), *complaint dismissed on remand, CBS v. ASCAP*, 620 F.2d 930, 935–36 (2d Cir. 1980) (court finds blanket license lawful under rule of reason, citing customers' election to use such licenses "in preference to realistically available marketing alternatives", copyright owners' "unimpaired independence to set up competitive prices for *individual* licenses" and risk-free availability of blanket license renewal should individual negotiations fail), *cert. denied, CBS v. ASCAP*, 450 U.S. 970 (1981), *reh'g denied*, 450 U.S. 1050 (1981).

[67] *See Flood v. Kuhn*, 407 U.S. 258 (1972) (professional baseball held not intended by Congress to be included as "trade or commerce" within meaning of Sherman Act; agreements among baseball clubs to adopt uniform player contract embodying "reserve system" therefore exempt from Act's coverage).

[68] *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19–20 (1979), *citing United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13, 441 n.16 (1978). *See also* notes 58 and 66 above. *See also Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958) ("there are certain agreements which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use").

can only be viewed as an aberration from the Supreme Court's own approach. There simply is no basis in antitrust policy for the majority's strict *per se* rule.[69] [27]

Perhaps the potential dangers created by the majority's unnecessary ruling today will be limited to some extent by the relative infrequency of Section 8 challenges.[70] However, the majority's holding that Section 8 is a strict *per se* statute that admits of no form of *de minimis* exception—coupled with its expansion of the definition of interlocked corporations to include foreign parents of interlocked domestic firms —may well encourage the filing of more such actions. To the extent such lawsuits attack procompetitive or competitively neutral interlocks, today's decision may well harm competition more than it promotes it.

In its recent *Ethyl* decision [101 F.T.C. 425], the same Commission majority asserted that the new antitrust cause of action created in that case could be invoked only by the Commission itself under Section 5 of the FTC Act, and was thus not susceptible of misuse by private [28] litigants.[71] The same cannot be said of the majority's

[69] *See, e.g.*, Wilson, *Unlocking Interlocks: The On-Again Off-Again Saga of Section 8 of the Clayton Act*, 45 Antitrust L.J. 317, 329 (1976) (62 years of Section 8 enforcement "has produced no hard evidence of an actual trade restraint", and comprehensive FTC study and numerous Congressional hearings "have likewise turned up no actual abuses caused by director interlocks"; to the contrary, "all interlocks are not inherently evil," and "Many interlocks—especially those involving directors with a financial background—may provide more benefits than risks of abuse"); Halverson, *Interlocking Directorates—Present Antitrust Enforcement Interest Placed in Proper Analytical Perspective*, 21 Vill. L. Rev. 393, 393–94 (1975–76) ("corporate interlocks and their effects on competition are perhaps the least understood relationships in the history of antitrust law enforcement", and "efforts to understand the actual effects of these [interlock] relationships and their impact, if any, on competition have been largely unsuccessful"); Travers, *Interlocks in Corporate Management and the Antitrust Laws*, 46 Tex. L. Rev. 819, 834 (1968) ("very little is known about the actual effects of interlocks"); Note, *Interlocking Directorates and Section 8 of the Clayton Act*, 44 Alb. L. Rev. 139, 154–55 (1979) ("interlocks are not necessarily inherently evil", and "no study has ever produced concrete evidence that interlocks actually have resulted in anticompetitive abuses"); Staff of Antitrust Subcomm. of House Comm. on the Judiciary, 89th Cong., 1st Sess., Interlocks In Corporate Management 6 (Comm. Print 1965) ("as of this time, there are virtually no factual analyses of how interlocking business organizations deal with particular transactions and the social and economic impact of such transactions"). *See also* Clanton Statement at 1 ("Because of these [significant] changes [in the corporate world since 1914] it has been argued that an overly strict application of Section 8 may limit the pool of qualified directors without any compensating benefits to competition, since it is unlikely that directors of multibillion dollar corporations are involved in routine business decisions where only a few million dollars of competitive overlap are involved").

Commissioner Bailey's concurrence refers to a 1978 congressional staff study that purportedly details the potential adverse effects of interlocks in general. (Bailey Op. at 15.) However, most of the effects hypothesized in the quoted paragraph have nothing to do with competition. Moreover, the staff report concedes that "there has been no effort to look at the broad array of interlocks as they may affect one or more industries or markets, or the Nation's economy in general." Interlocking Directorates Among the Major U.S. Corporations, 95th Cong., 2d Sess. 10–11 (Comm. Print 1978). Further, not only does the 1978 staff report fail to cite a single study finding actual anticompetitive effects resulting from competitor interlocks, but it expressly disclaims reaching any such conclusions itself, stating:

> *This report does not make any allegations as to the predatory use of specific interlocks for . . . anticompetitive purposes.* (*Id.* at 27, emphasis added.)

[70] *See, e.g., United States v. W. T. Grant Co.*, 345 U.S. 629, 630 (1953) (39 years following Clayton Act's passage until Supreme Court decides first of its two §8 cases); *Protectoseal Co. v. Barancik*, 484 F.2d 585, 586–87 (7th Cir. 1973) (7th Circuit considers its first Section 8 case 59 years after Clayton Act enacted).

[71] *Ethyl Corp. et al.*, 3 Trade Reg. Rep. (CCH) ¶22,003 (Mar. 22, 1983) at p. 22,560, [101 F.T.C. 425] *appeals docketed*, No. 83–4102 (duPont) (2d Cir. May 25, 1983) and No. 83–4106 (Ethyl) (2d Cir. May 27, 1983). *But see id.*, Miller, Chairman, dissenting at p. 22,566 (noting danger that private litigants would attempt to graft unilateral "facilitating practices" theory onto Sherman Act via tacit collusion or conspiracy theories).

action today. While I generally agree with Commissioner Clanton's suggestion that one means by which the Commission could seek to avoid the policy concerns raised by a Section 8 strict *per se* rule is through the adoption of a *de minimis* exception in prosecutorial guidelines (Clanton Statement at 2.), no such constraint would apply to private litigants bringing Section 8 actions.[72] When competitive effects are made virtually irrelevant in Section 8 cases—as they will be if the rule adopted by the Commission's decision is followed by the appellate courts—there is no check to assure that prosecution of private actions will promote the public interest. This factor assumes added importance when one considers that private Section 8 lawsuits are often initiated for purposes having no relation to any alleged injury to competition.[73] Perhaps the clearest illustration of such misuse of Section 8 is the lawsuit brought as part of a struggle for control over the board of directors of Paramount [29] Pictures in the mid-1960's. Following the breakdown of a compromise entered to avoid a proxy fight, the plaintiff corporation brought suit pursuant to Sections 7 and 8 of the Clayton Act to secure removal of two dissident shareholder-directors. As the district court stated in that case:

> The purpose of this suit was not to protect the plaintiff or the public against a violation of the Clayton Act, but rather to serve the interest of the majority of Paramount's board of directors in securing the removal of the two dissident directors.[74]

Presumably, the majority's answer to this potential for private mischief is that Congress weighed that possibility and assumed the risk when it determined in 1914 to make Section 8 a *per se* statute, and it "has declined thus far to alter the *per se* rule for finding a violation under Section 8." (*See* Maj. Op. at 25.) As the above discussion of legislative history makes clear, however, this argument lacks sufficient merit to justify the imprudent antitrust policy established today.

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[72] *See BankAmerica Corp. v. United States*, 51 U.S.L.W. 4685 (U.S. June 8, 1983) at 4688 (rejecting Government's argument that expanding Section 8 scope to prohibit bank-nonbank interlocks would not upset business world's longstanding reliance on earlier, narrower interpretation of Section 8 because of Government's intent to grant "amnesty" to directors who resign within reasonable time; Court notes "such persons face possible civil liability . . . against which the Government cannot . . . render them immune").

[73] *See, e.g., American Bakeries Co. v. Gourmet Bakers, Inc.*, 515 F.Supp. 977, 979 (D. Md. 1981) (as part of hostile proxy contest, Clayton Section 8 action brought against insurgent candidate for directorship in plaintiff company); *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195, 1197–98 (2d Cir. 1978) (as part of proxy fight, plaintiff firm brought Clayton Sections 7 and 8 and securities suit to prevent defendant firm—having acquired minority shareholder interest in plaintiff—from electing directors to plaintiff's board and compelling plaintiff to sell unrelated, recently-acquired business); *American Medicorp, Inc. v. Humana, Inc.*, 445 F.Supp. 573, 577–78 (E.D. Pa. 1977) (plaintiff firm brought suit under Clayton Section 8, other antitrust laws, and securities laws, to enjoin hostile tender offer by defendant corporation); *In Re Penn Central Securities Litigation*, 367 F.Supp. 1158, 1162–66 (E.D. Pa. 1973) (plaintiff minority shareholders brought class action and stockholders derivative suit under securities and antitrust laws—including Section 8—against numerous related firms, their directors, and others, to halt defendant parent corporation's alleged allocation of territories and markets among its subsidiaries).

[74] *Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co., Inc.*, 1966 Trade Cas. (CCH) ¶71,678 at p. 82,066 (S.D.N.Y. 1966).

Section 8 will only be a strict *per se* statute if the Commission and the courts interpret it as such. Congress did not make it so, and the relevant case law is divided. Since a strict *per se* interpretation is inconsistent with sound antitrust policy[75] (I do not understand the majority to argue otherwise), I believe the Commission should opt for the more flexible view. Under that preferred approach, adjudicators may and should—in some fashion—consider the degree of competitive overlap and the likely threat to competition before condemning a director interlock under the imprecise prohibitions of [30] Section 8 of the Clayton Act.[76]

II. THE FORMER HORIZONTAL OVERLAP BETWEEN BORG-WARNER AND BOSCH APPEARS TO HAVE BEEN MINIMAL

One of the most important facts to consider in assessing the majority's conclusions in this specific matter is that the competitive overlap at issue no longer exists. No direct overlap ever existed between Borg-Warner and Bosch GmbH. The only overlap was between the latter's domestic subsidiary, Bosch U.S., and Borg-Warner. However, in July 1981—almost two years ago—Borg-Warner sold all of its automotive aftermarket operations to The Echlin Manufacturing Company.[77] Since Borg-Warner's withdrawal from the relevant product lines occurred over a year after the initial decision in this matter, the ALJ's conclusions concerning liability and the need for injunctive relief did not consider this important fact. (It should also be noted that not even Bosch U.S. continues to sell the relevant product lines; shortly before completion of trial in this matter production of those parts was taken

[75] As indicated above, the majority's strict *per se* prohibition of interlocks may actually restrain beneficial competition by disregarding potentially procompetitive reasons for employing director interlocks. Thus, the majority's approach may impair the efficiency of corporations in various ways, including: reducing the number of qualified director candidates, especially in fields where there is a shortage of qualified experts; prohibiting smaller corporations from taking advantage of expertise that may be more readily available to their larger competitors; increasing the difficulty confronting firms required by state law to be incorporated in a state to conduct business there; and making it more difficult to enter new industries in which an incumbent firm shares a director with the prospective entrant.

[76] As the majority concedes (Maj. Op. at 24 n.25.), this position also finds support among the commentators. *See, e.g.*, Wilson, *Unlocking the Interlocks: The On-Again Off-Again Saga of Section 8 of the Clayton Act*, 45 Antitrust L.J. 317, 324 (1976) (noting "Throughout antitrust, courts have recognized a general concept of de minimis," and citing *Paramount Pictures* as "the leading opinion on the applicability of the general de minimis concept" to Section 8); Halverson, *Should Interlocking Director Relationships Be Subject to Regulation And, If So, What Kind?*, 45 Antitrust L.J. 341, 350 (1976) (citing *Paramount Pictures*, recommends adoption of a policy "pursuant to which antitrust officials would seek to dissolve only those interlocks which involve companies with a significant competitive overlap"; conversely, "where the competitive overlap is de minimus [sic], the risk of competitive abuse is minute and does not justify the expenditure of the public's funds"); Note, *Interlocking Directorates and Section 8 of the Clayton Act*, 44 Alb. L. Rev. 139, 145–46 (1979) (characterizing Section 8 as a *per se* prohibition only of interlocks satisfying other statutory requirements, including that "the competition must not be *de minimis* [sic]", which "insures that the competitive overlap between the interlocked corporations is significant enough to threaten anticompetitive abuses"). *Cf.* Travers, *Interlocks in Corporate Management and the Antitrust Laws*, 46 Tex. L. Rev. 819, 846 (1968) (suggests no *de minimis* exception be recognized, conceding this approach would probably lead courts to hold interlocked firms were not "competitors" where actual overlap is insignificant; concludes: "An explicit de minimis exception has the advantage of permitting the courts a greater degree of candor and is more likely to produce consistent doctrine").

[77] *See The Echlin Mfg. Co., et al.*, Docket No. 9157 (Complaint ¶11) (July 23, 1981).

over by a different subsidiary of Bosch [31] GmbH.[78]

Putting Borg-Warner's withdrawal aside for the moment, whatever possible threat to competition may have arisen from the overlaps thought to have existed at the time the complaint in this matter was issued, it is clear that the extent of those alleged overlaps dwindled considerably over the course of this litigation. The complaint alleges that Borg-Warner and Bosch competed in at least nine specified distinct product lines.[79] At trial, complaint counsel offered no evidence at all as to two of those lines.[80] The ALJ found insufficient evidence on which to base a finding of competition in three other lines.[81] In addition, the majority upholds (correctly, I believe) the ALJ's finding of insufficient evidence to establish the parent-subsidiary control requisite for a Section 8 violation in yet another line.[82] (Maj. Op. at 21 n.22.) The majority holds that "Borg-Warner was a competitor of Bosch U.S. in sales of ignition parts, wire and cable products, and carburetor tune-up kits with application on foreign cars." (*Id.* at 16.) Thus, the majority concedes that it can now identify only a relatively narrow product line grouping in which the two domestic corporate respondents competed prior to Borg-Warner's complete withdrawal from all relevant product lines almost two years ago. (*Id.* at 31.) This fact is important not only for its relevance to the question of the need for injunctive relief (discussed in Part IV below); it would also be relevant to any competitive analysis of the challenged interlock—an analysis the majority refuses to undertake even in cursory fashion. [32]

I do not take issue with the majority's finding that Borg-Warner and Bosch U.S. formerly competed in the manufacture and sale of some segment of automotive replacement parts. (Maj. Op. at 16.) The record here is susceptible of several alternative definitions for the boundaries of that segment. But assuming the majority has identified correctly the product group in which competition formerly existed, there is scant information in the record—as the ALJ concluded (ID 46.)—from which we might attempt to infer the extent of that competitive overlap. The ALJ found that in 1979 Borg-Warner had worldwide sales of approximately $3 billion. (IDF 3, *citing* Tr. 1063–64.) While the majority was unable to find accurate figures in the record, it accepts the ALJ's estimation that in 1978 Borg-Warner made approximately $900,000 in sales in what the majority finds to be the overlapping product line. (Maj. Op. at 5 n.4.) Thus, the best that can

[78] Letter from Joseph A. McManus, Esq., to ALJ von Brand, *ex parte* (Feb. 4, 1980) at 1.

[79] Automotive "ignition parts, wire and cable, carburetors, carburetor kits, automotive test equipment, automotive air conditioner compressors," and certain non-automotive product lines, "such as hydraulic valves, hydraulic gear pumps and motors." (Complaint ¶ 12) (Nov. 7, 1978).

[80] Carburetors and automotive test equipment. (ID 2 n.1.)

[81] Hydraulic valves, gear pumps, and motors. (ID 49–52.)

[82] Automotive air conditioning compressors. (ID 52.)

be said is that Borg-Warner's *1978* overlapping sales were three one-hundredths of one percent of its overall *1979* sales.

With respect to Bosch U.S., the majority finds that 1978 sales by its automotive aftermarket division were $72 million (*Id.* at 5.), and the ALJ's findings indicate overall 1978 Bosch U.S. corporate sales were approximately $172.54 million. (IDF 47.) Conceding record evidence on the point to be "somewhat sketchy", the majority concludes that the best estimate of Bosch U.S.'s sales in the overlapping product group was $5.4 million (*Id.* at 5–6 and n.6), or 7.5 percent of that one division's 1978 sales and only about 3.1 percent of overall Bosch U.S. corporate sales. As the majority concedes, these $900,000 and $5.4 million sales figures "are relatively small fractions of the total business of these corporations." (Maj. Op. at 31.)

Thus, our best (albeit imperfect) estimate of combined, overlapping sales for 1978 is approximately $6.3 million. Unfortunately, there is no evidence in this record concerning what percentage of the overall U.S. automotive aftermarket in this overlapping "product group" this estimated $6.3 million in combined sales accounts for. It might be one-tenth of one percent, 10 percent, or 50 percent. The majority simply doesn't care which is the case. Because two competing firms with an infinitesimal [33] combined market share could theoretically enter a (hopelessly futile) *per se* unlawful agreement to fix prices or divide markets, the majority believes Section 8 requires condemnation of this challenged interlock arrangement. (*See Id.* at 26.)

However, even setting aside the majority's incorrect conclusions concerning the legislative history of Section 8, there remain—as Commissioner Clanton concedes—"important policy concerns about condemning technical, inadvertent or trivial violations of Section 8." (Clanton Statement at 1.) In my judgment, the Commission should ascertain whether the former director interlock between firms with $6.3 million in overlapping sales falls into the category of "trivial" or *de minimis* matters.[83] Although the majority asserts that the $6.3 million figure is "clearly not *de minimis*" (Maj.Op. at 23 n.23), I do not find that conclusion so obvious, especially when the more appropriate focus upon competitive significance (rather than dollar amounts) is considered. The ALJ described the record before us as "narrowly based", and concluded that it "does not permit an evaluation of the competitive effects of the [challenged interlock] arrangements." (ID 58.) Because the present record affords insufficient evidence to assess

[83] *Cf. Protectoseal Co. v. Barancik*, 484 F.2d 585, 587 (7th Cir. 1973) (plaintiff alleged combined market shares of competing, interlocked firms exceeded 50 percent of competing product line alleged in complaint); *United States v. Crocker National Corp.*, 656 F.2d 428, 433 (9th Cir. 1981) (parties stipulated that three defendant banks—among largest in U.S.—had outstanding real estate loans of $6.5 billion and competed with and shared directors with four of largest insurance companies having $32 billion in such loans outstanding), *rev'd on other grounds sub nom., BankAmerica Corp. v. United States*, 51 U.S. 4685 (U.S. June 8, 1983).

whether the challenged interlock created a danger to competition between either the interlocked firms, or among all firms in the industry, I would remand to the ALJ to receive evidence and make findings on these critical issues.

III. THE SALE OF THE OVERLAPPING ASSETS—COMBINED WITH THE RESIGNATION OF THE INTERLOCKED DIRECTORS—APPEARS TO MOOT THIS PROCEEDING

I agree with the majority that the resignation of the individual respondents Merkle and Bacher following issuance of the Commission's complaint, in and of itself, does not, [34] as a legal matter, automatically moot this case. (Maj. Op. at 29–30.) The Supreme Court so held in *United States v. W. T. Grant Company.*[84] However, as one district court explained in dismissing a Section 8 case for mootness on this basis, "it is within the discretion of [the adjudicator] to determine that under all the circumstances it does [moot the Section 8 claims]."[85] In *W.T. Grant* the Supreme Court elaborated further that even where director resignations do not moot the proceedings,

> The case may nevertheless be moot if the defendant can demonstrate that "there is no reasonable expectation that the wrong will be repeated." The burden is a heavy one.[86]

Respondent Bacher's death has removed the possibility that any Section 8 violation will recur with respect to him. However, this leaves the question of whether Borg-Warner's post-complaint sale of its automotive parts division to Echlin—taken together with the resignation of respondent Merkle—removes any "reasonable expectation that the wrong will be repeated," at least as to Borg-Warner.

In two Section 8 cases, the resignation of the interlocked directors, together with the post-complaint sale or discontinuance of the overlapping product line by one of the interlocked firms, has been held to moot the Section 8 suit. In *Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co., Inc.,*[87] the district court found that the post-complaint sale of stock in one of the interlocked corporations, coupled with the [35] resignation of one of the two interlocked directors, "has

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[84] 345 U.S. 629, 630–32 (1953). *See also Kraftco Corp., et al.,* 89 F.T.C. 46, 65–66 (1977), *remanded as to relief sub nom., SCM Corp. v. FTC,* 565 F.2d 807 (2d Cir. 1977), *identical order reissued on remand, Kraftco Corp., et al.,* 92 F.T.C. 416, 419 (1978), *aff'd sub nom., SCM Corp. v. FTC,* 612 F.2d 707 (2d Cir.), *cert. denied,* 449 U.S. 821 (1980); *United States v. Newmont Mining Corp.,* 34 F.R.D. 504, 505 (S.D.N.Y. 1964).

[85] *In Re Penn Central Securities Litigation,* 367 F.Supp. 1158, 1168 (E.D. Pa. 1973), *citing United States v. W.T. Grant Co.,* 345 U.S. 629 (1953) (resignation of four interlocking directors, coupled with finding of no Sherman Act Section 1 violation, held to render Section 8 claims moot); *cf. United States v. Newmont Mining Corp.,* 34 F.R.D. 504, 507–08 (S.D.N.Y. 1964) (on facts of case—including multiple alleged interlocks—director resignations did not entitle defendants to *summary judgment* on mootness issue).

[86] 345 U.S. at 633, *citing United States v. Aluminum Co. of America,* 148 F.2d 416, 448 (2d Cir. 1945).

[87] 1966 Trade Cas. (CCH) ¶71,678 (S.D.N.Y. 1966).

rendered moot any claim of violation of §8."[88] Similarly, in *United States v. Cleveland Trust Company,*[89] the district court granted a motion by a corporate defendant (Pneumo-Dynamics Corporation) to dismiss a Section 8 claim on the ground that the post-complaint sale of its assets in the relevant product market had rendered the Section 8 case moot *as to that defendant.* Following a discussion of *Paramount* the court stated:

> Pneumo has effectively divested itself of all interests in the machine tool industry, and does not retain the necessary facilities to resume such operations in the future. *It is no longer possible, therefore, for Pneumo to eliminate competition in that industry by means of an agreement with [the other interlocked corporate defendants]* resulting in a violation of any of the provisions of the antitrust laws. *At best, it is conjectural whether Pneumo will ever be able to do this at some future date.* This aspect of the Government's section 8 case, accordingly, has become moot. (Emphasis added)[90]

As indicated, the court did not dismiss the Section 8 case as moot as to the other corporate defendants. Nevertheless, this precedent appears to support a legal conclusion that this proceeding is now moot with respect to Borg-Warner.

As in *Paramount* and *Cleveland Trust,* Borg-Warner no longer manufactures the product line in which the challenged overlap existed. Its "divestiture" of its auto parts division might in normal circumstances be sufficient under *Paramount* and *Cleveland Trust* to moot any competition concerns that might have resulted from a director interlock. But here there is an additional wrinkle: the Commission challenged that sale on antitrust grounds, and issued a complaint against not only the acquiring firm (Echlin), but the seller—Borg-Warner—as well.[91] The majority raises the specter that, should the sale to Echlin ultimately be found unlawful, it is possible that the relief ordered may [36] involve Borg-Warner's reacquisition of its former auto parts unit. (Maj. Op. at 33–34.)

I view the probability of a Commission order having that effect to be, in the words of *Cleveland Trust,* conjectural at best. (In so concluding, of course, I express no view whatever on the merits in the *Echlin* matter or on the form of relief that might be appropriate should liability be found there.) Borg-Warner will only reacquire its former auto parts division *if* the Commission finds the sale challenged in the *Echlin* matter to be unlawful and *if* it orders or approves the reacquisition. If the competitive danger was *de minimis* or non-existent, then the danger the interlock might recur as a result of relief the Commission might impose if it finds liability in the *Echlin* matter would seem

[88] *Id.* at p. 82,060.
[89] 392 F.Supp. 699 (N.D. Oh. 1974).
[90] *Id.* at 709–10.
[91] *Echlin Mfg. Co., et al.,* Docket No. 9157 (July 23, 1981).

inconsequential. However, as noted above, the record affords the Commission no basis on which to determine whether the competitive effect of the former interlock was anything more than *de minimis.*

Thus, I am inclined to conclude that, at least as to respondent Borg-Warner, the possibility of the challenged overlap recurring is so remote and speculative that it fails to meet the legal standard that the majority recognizes (Maj. Op. at 29–30, 34.): that there is no "cognizable danger" that the challenged interlock (or any other interlock in this market between these two respondents) will recur. I would include this possible mootness among those issues that I believe should be remanded to the ALJ. However, regardless of whether the above factors are sufficient to dictate a legal conclusion of mootness as to Borg-Warner, as the following section explains they may well be adequate to remove any necessity for issuance of injunctive relief against any of the respondents.

IV. ISSUANCE OF AN ORDER APPEARS UNNECESSARY ON THE FACTS IN THIS RECORD

As is clear from Commissioner Clanton's concurring statement, even assuming a Clayton Act violation and a lack of mootness, the case for issuing an order here is less than overwhelming. Commissioner Clanton finds it a "close call", citing the relatively small dollar overlap between Borg-Warner and Bosch, and Borg Warner's sale of its auto parts division to Echlin. (Clanton Statement at 1.) While respondents' apparent lack of [37] any systematic screening program tips the balance toward the need for an order in Commissioner Clanton's mind (*Id.*), I believe the other factors discussed above are probably sufficient to negate any public interest in issuance of the order promulgated by the majority today. Thus, even were there a sufficient basis to find Borg-Warner, Bosch, and the individual respondents liable on this sparse record, I doubt it is necessary to issue an order against any of the respondents.[92]

Clearly, under Section 8 (as under other regulatory laws), "there is no *per se* rule requiring the issuance of an injunction upon the showing of a past violation."[93] As the Second Circuit stated, "it is for the FTC to weigh these considerations [relevant to the likelihood of a recurrent violation]."[94] Indeed, the first of only two Supreme Court decisions ever to consider Section 8 liability—*United States v. W. T. Grant Co.*—affirmed a district court's refusal to award injunctive

[92] *Cf. Ethyl Corp., et al.*, 3 Trade Reg. Rep. (CCH) ¶22,003 at 22,553–58 (Mar. 22, 1983) (though all four respondents found liable under §5, Commission order covers only two), *appeals docketed,* No. 83–4102 (duPont) (2d Cir. May 25, 1983) and No. 83–4106 (Ethyl) (2d Cir. May 27, 1983).

[93] *SCM Corp. v. FTC,* 565 F.2d 807, 813 n.18 (2d Cir. 1977), *cert. denied,* 449 U.S. 821 (1980), *quoting SEC v. Bausch & Lomb, Inc.*, 565 F.2d 8, 18 (2d Cir. 1977).

[94] 565 F.2d at 813 n.18.

relief, despite its finding of Section 8 violations that were not mooted by the interlocked director's resignation.[95] This result came even though the defendant director had been found liable for three separate interlocks involving six corporations upon whose boards he sat.[96] In reaching this result, the Supreme Court held that the party moving for injunctive relief

> . . . must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. . . . To be considered are the bona fides of the expressed intent to comply, the [38] effectiveness of the discontinuance and, in some cases, the character of the past violations.[97]

As the Second Circuit recently instructed the Commission in *SCM Corporation v. FTC,* the burden is on *complaint counsel* to show injunctive relief is necessary, *not* on respondent to show it is unnecessary.[98] I am not satisfied that this record makes the requisite showing. The sale of Borg-Warner's auto parts unit, coupled with the resignation of Messrs. Merkle and Bacher and the latter's subsequent death, are, in my judgment, persuasive evidence of "the effectiveness of the discontinuance" of the challenged interlock. Several Section 8 cases on this very issue lend strong support to this conclusion. Thus, even assuming Section 8 liability and a lack of mootness, several courts have relied upon some combination of director resignation and sale of the overlapping assets as a sufficient basis for invoking judicial discretion to deny injunctive relief.[99]

Two courts of appeals have recently clarified that this is not simply another argument that the case should be dismissed for mootness. As the Second Circuit explained in *SCM:* [39]

> [M]ootness and denying a request for injunctive relief . . . are analytically distinguishable [concepts] and a court could find that a case is not moot and yet deny injunctive relief.[100]

The Ninth Circuit also addressed this point in *TRW:*

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[95] *United States v. W. T. Grant Co.,* 345 U.S. 629, 633–36 (1953).

[96] *Id.* at 630, 633–34.

[97] *Id.* at 633.

[98] *SCM Corp. v. FTC,* 565 F.2d 807, 812–13 (2d. Cir. 1977), *cert. denied,* 449 U.S. 821 (1980).

[99] *See, e.g., TRW, Inc. v. FTC,* 647 F.2d 942, 954 (9th Cir. 1981) (although case not moot, court cites factors including non-blatant nature of Section 8 violation and discontinuance of directorship before FTC investigation in holding Commission erred in issuing cease and desist orders against corporate respondent and interlocked former director); *Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co., Inc.,* 1966 Trade Cas. (CCH) ¶71,678 (S.D.N.Y. 1966) (assuming, arguendo, Section 8 violation had occurred, in exercise of discretion court declines to issue order against defendants, citing sale of overlapped assets and resignation of interlocked directors in concluding plaintiff failed to show "cognizable danger of recurrent violation"); *see also SCM Corp. v. FTC,* 565 F.2d 807 (2d Cir. 1977), *cert. denied,* 449 U.S. 821 (1980) (finding Commission used incorrect legal standard in deciding interlocked director's post-complaint resignation did not make injunctive relief unnecessary).

[100] *SCM Corp. v. FTC,* 565 F.2d 807, 812 (2d Cir. 1977), *cert. denied,* 449 U.S. 821 (1980), *citing United States v. Newmont Mining Corp.,* 34 F.R.D. 504 (S.D.N.Y. 1964).

The difference between the standard governing mootness and that regarding the need for prospective relief thus is one between a "mere possibility" and a "cognizable danger" of recurrent violation. More significantly, the Commission complaint counsel bears the burden of showing the need for injunctive relief while the burden of proving mootness rests on the respondent.[101]

Moreover, this same Commission majority exercised this identical discretionary authority in its recent *Ethyl* decision.[102]

Even if one were to accept (which I do not) the majority's proposition that its strict *per se* construction of Section 8 was either intended by Congress or mandated by the language of the statute, that respondents have violated that strict *per se* rule, and that it is irrelevant whether the extent and nature of the competitive overlap was *de minimis,* I would still oppose issuance of an order on this record as it now stands. The majority has, in essence, ruled evidence of the existence or extent of pro- or anticompetitive effects irrelevant as to Section 8 liability. However, I do not interpret this holding to mean that such evidence cannot be considered on the appropriateness and necessity of injunctive relief. Given the other factors discussed above that militate against issuance of an order here, it is unfortunate that the record is silent on the one issue that might tip the balance clearly in one direction or the other. [40]

We simply do not know what the competitive effect of the challenged interlock was, how any such effect would be mitigated by the sale of the overlapping product line, or what the effect of the majority's order is likely to be. Hence, I believe we should remand this matter to the ALJ to receive this and other evidence relating to the necessity of injunctive relief. If such evidence shows a danger of a recurring interlock that may pose a threat to competition, an order could then issue. If, however, such additional evidence disclosed no danger of recurrence, or that any such danger would likely have either a trivial or non-existent anticompetitive impact, then I believe no order should issue. Given the harsh rule of liability adopted today and its uncertain ramifications, I believe such a course would be prudent and appropriate here, especially in light of the Commission's important enforcement responsibilities and its duty to assure that its actions are consistent with the public interest.

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[101] 647 F.2d 942, 954 (9th Cir. 1981), *citing SCM Corp. v. FTC,* 565 F.2d 807, 812–13 (2d Cir. 1977), *cert. denied,* 449 U.S. 821 (1980).

[102] *See Ethyl Corp., et al.,* 3 Trade Reg. Rep. (CCH) ¶22,003 (Mar. 22, 1983) at p. 22,557–58 (imminent and complete withdrawal of one respondent from four-firm industry held not to moot proceeding as to it; withdrawing firm found liable, but not subject to final order entered against two of four respondents) [101 F.T.C. 425], *appeals docketed,* No. 83–4102 (duPont) (2d Cir. May 25, 1983) and No. 83–4106 (Ethyl) (2d Cir. May 27, 1983).

V. CONCLUSION

The majority has adopted an unnecessarily harsh construction of Clayton Act Section 8 to condemn an indirect director interlock that no longer exists, that very probably can only recur if the Commission requires or permits it, and that—on the basis of this meager record—appears trivial in scope. The majority has done so without any consideration of whether either the challenged interlock or the remedy imposed will help or harm competition. This decision perpetuates an improvident standard of liability under Section 8, notwithstanding that the language of the statute, its legislative history, the relevant judicial precedent, and the facts of this particular case all furnish ample room to reach a contrary result that would promote sound antitrust policy.

It appears that, for a majority of this Commission, *de minimis curat lex.*

SEPARATE STATEMENT OF COMMISSIONER CLANTON

While I concur in the Commission's decision, I would like to offer some additional comments on the *de minimis* issue.

The fundamental difficulty with applying Section 8 of the Clayton Act in a rote *per se* fashion is that the corporate world has changed significantly since 1914. The $1 million statutory threshold today encompasses the activities of thousands of small businesses, firms that presumably were not subject to the Act at the time it was passed. In addition, a substantial and increasing number of major corporations are conglomerates or are, by necessity, widely diversified. Because of these changes, it has been argued that an overly strict application of Section 8 may limit the pool of qualified directors without any compensating benefits to competition, since it is unlikely that directors of multibillion dollar corporations are involved in routine business decisions where only a few million dollars of competitive overlap are involved. For these reasons, among others, it is urged that a *de minimis* exception should be recognized in Section 8.

The Commission's opinion ably discusses the relevant legal precedent on this subject and, I believe, correctly concludes that, as a matter of law, there is no dollar floor, other than the statutory minimum of $1 million, below which liability will not attach. Nevertheless, the dissent raises important policy concerns about condemning technical, inadvertent or trivial violations of Section 8 because of the *per se* operation of the statute and the necessity for an order in the instant case.

It is a close call whether an order should issue in this case because

of the relatively small dollar overlap and Borg Warner's sale of its Automotive Parts Division to Echlin Manufacturing Corporation. My principal reason for supporting a limited order is the apparent lack of any systematic screening program for identifying future interlocks, thus leaving the potential for violations to recur. While in some circumstances a more appropriate remedy might be to simply require respondents to set up an effective compliance program, the modest prohibition on interlocks in the automotive parts business embodied in this order seems appropriate given the history of this case. This approach is also consistent with the direction of the courts—to closely scrutinize the scope of relief in interlock cases in order to temper the potentially harsh effects of a *per se* application of the statute. *See, e.g., TRW, Inc.* v. *F.T.C.*, 647 F.2d 942 (9th Cir. 1981). [2]

However, while I endorse continued judicial restraint in the selection of appropriate remedies in Section 8 cases, the Commission has the present ability to address the *de minimis* issue in other contexts as well. The $5 million threshold established in this Order, in an effort to mitigate the potential risk of civil penalties for technical violations, represents a responsible *de minimis* standard that should be articulated by the Commission in prosecutorial guidelines. I believe that an enforcement policy of this nature is consistent with the statutory scheme and modern-corporate reality and would go a long way to address many of the valid concerns raised by the dissent. Moreover, in view of the debate about the legislative history of this statute and the substantial changes that have taken place in the corporate world in the last six decades, it may be timely for Congress to revisit this issue to provide enforcement agencies and the business community with its contemporary judgment concerning the import of Section 8.

SEPARATE CONCURRING STATEMENT OF COMMISSIONER PATRICIA P. BAILEY

The dissenters in this case argue that antitrust liability under Section 8 of the Clayton Act should require some assessment of the competitive effects of challenged interlocking directorates between competing corporations. Applicable case law has held that Section 8 has *per se* application once the elements set out in the statute have been established. The dissenters have found no case that takes their contrary view, which they argue is more consistent with their understanding of sound antitrust policy. At the very least, the dissenters state, Section 8 admits of a *de minimis* commerce exception to liability, and that the better line of case law on the subject supports such an interpretation. Because the dissenters would apply a different legal standard than the one endorsed in this case, they would dismiss

this proceeding or remand it for some assessment of competitive effects.[1] [2]

I would have had nothing to add to the Commission's decision in this matter but for the fact that the dissenters argue that a competitive effects test is grounded in the legislative history of Section 8, and that the precedents are in error because they turn on a misunderstanding or misreading of that history. On the contrary, the legislative material relied upon by the dissenters constitutes a single shard of the history of this statute, and a fuller consideration of this history provides ample basis for the uniform judicial approach to liability that has been taken by the courts and by the Commission in this case.

Thirty years ago, Judge Weinfeld, in *United States v. Sears, Roebuck & Co.*,[2] laid out what has been termed a "*per se*" approach to Section 8 of the Clayton Act.[3] Section 8 prohibits interlocking directorates among two or more corporations engaged in commerce, any one of which has more than $1 million in capital, surplus, and undivided profits, "if such corporations are, or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws."[4] Judge Weinfeld in *Sears* reasoned that Section 8 analysis need not determine whether a hypothetical merger between the interlocked corporations would violate the antitrust laws under the rule of reason, because price fixing was also an "elimination of competition" which would be a *per se* antitrust violation if undertaken by the interlocked corporations.[5]

The court in *Sears* observed that the legislative history of Section 8 was "inconclusive" in determining the meaning of the "so that" clause.[6] A thorough reexamination of the legislative history reveals that Congress considered and failed to enact several proposals that would have made the statutory language of Section 8 either more stringent or more like Section 7; that House and Senate Reports noted the breadth of the bill and its design to deal with antitrust violations in their incipiency; that the proposal and rejection of the so-called Cummins amendment was an [3] ambiguous reflection on the intent of Congress; that commentators shortly after the passage of Section 8 noted succinctly the problem of interpreting the "so that" clause;

[1] The dissenters do not explain the evidentiary elements of their competitive effects test for Section 8, except to say that it falls somewhere in between the *per se* and full-blown rule of reason tests that lie at opposite ends of the antitrust scale. Such a conjectural standard would be left presumably to future courts to define, without much guidance from the language of the statute itself.

[2] 111 F.Supp. 614 (S.D.N.Y. 1953).

[3] *See id.* at 620–21.

[4] 15 U.S.C. 19.

[5] *See United States v. Sears, Roebuck & Co.*, 111 F.Supp. at 616–17, 619–21.

[6] *Id.* at 619.

and that investigations and staff reports by subsequent Congresses have reaffirmed the need to check the potential abuses of interlocking directorates. Finally, and most telling, courts confronted by the very questions raised in the dissenting opinion here have examined the whole of the available record on Congressional intentions with respect to Section 8 and applied a strict theory of liability.

A. *Early Bills*

Section 8 was passed in response to concern from several significant sources about the prevalence of interlocked directors. As early as 1908, the platform of one major political party called for legislation "preventing a duplication of directors among competing corporations."[7] The investigations by the so-called Pujo committee in 1913 revealed the extent of interlocking directorates among banks and other financial institutions.[8] The publication by Louis D. Brandeis of a series of articles in a popular periodical [4] also provided significant support for restrictions on such interlocks.[9] As the Supreme Court has recently noted, "Interlocks between large corporations were seen in the public debate as *per se* antogonistic to the public interest; many, including President Wilson, called for legislation that would, among other things, ban all kinds of interlocks."[10]

Several bills were introduced in Congress between 1908 and 1914 to restrict interlocking directorates by one means or [5] another.[11]

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[7] *See* National Party Platforms 1840–1968, at 146 (K. Porter & D. Johnson eds. 1970) (Democratic party platform of 1908). In 1908, the Republican party platform called for amendments to the Sherman Act in order that "its effectiveness may be strengthened." *Id.* at 146. The three major political parties in 1912 continued to call for amendments to the antitrust laws. The Democratic platform favored declaration by law of the conditions under which corporations could engage in interstate commerce, which included the prevention of interlocking directorates. *Id.* at 169. The Republicans continued support for "legislation supplementary" to the antitrust laws, *id.* at 184, and the Progressive party joined the Republicans in supporting creation of a Federal trade commission to promote antitrust enforcement. *See id.* (Republicans declare "there is much that may be committed to a Federal trade commission"); *id.* at 178 (Progressives support "strong Federal administrative commission of high standing, which shall maintain permanent active supervision over industrial corporations").

[8] House Comm. on Banking and Currency, Investigation of Concentration of Control of Money and Credit, H. Rep. No. 1593, 62d Cong., 3d Sess. (1913).

[9] Brandeis, *Breaking the Money Trusts,* Harpers Weekly, Nov. 22, 1913, to Jan. 14, 1914. In the course of debate on the Clayton Act one Congressman, citing the Brandeis articles and the Pujo report, summarized the extent of the problem of interlocking directorates as regarded even one corporation:

> Here is what the Pujo Committee found in regard to the members of the firm of J.P. Morgan & Co., and the directors of their controlled trust companies and of the First National and the National City Bank. They hold:
>
> One hundred and eighteen directorships in 34 banks and trust companies . . . .
>
> Thirty directorships in 10 insurance companies . . . .
>
> One hundred and five directorships in 32 transportation systems . . . .
>
> Sixty-three directorships in 24 producing and trading corporations . . . .
>
> Twenty-five directorships in 12 public-utility corporations . . . .
>
> In all, 341 directorships in 112 corporations having aggregate resources or capitalization of $22,245,000,000.

51 Cong. Rec. 9186 (1914) (statement of Mr. Helvering).

[10] *BankAmerica Corp. v. United States,* 51 U.S.L.W. 4685, 4687 (U.S. June 8, 1983).

[11] Some bills contemplated a statutory ban on interlocking directorates. *See, e.g.,* H.R. 14946, Section 5, 63d Cong., 2d Sess. (1914); H.R. 7762, Section 1, 63d Cong., 1st Sess. (1913); H.R. 12835, Section 2, 62d Cong., 1st Sess. (1911). Others contemplated requiring by federal or state charter that corporations engaged in interstate commerce not

Some of these bills proposed a ban on interlocking directorates of any sort.[12] Others proposed simply that interlocks between competing corporations be prevented, and provided formulations of "competition" that were even less specific than the language of what became Section 8. Typical bills prevented interlocks if the corporations were "in any competing business,"[13] in "substantially the same kind of business,"[14] "engaged in the same business,"[15] "carrying on a competitive business or a business of the same general character,"[16] and "competitors or [were] so situated that they naturally should be competitors."[17] [6]

At the opposite extreme, some bills contained language that specifically mandated a measurement of the competitive effects of interlocked directorates. In certain bills declaring unfair competition unlawful, unfair competition was defined to include "the destruction of competition through the use of interlocking directorates."[18] These bills also would have authorized the proposed trade commission to terminate the "substantially monopolistic power" of a corporation that was based primarily on "artificial bases," which included "the destruction of competition through the use of interlocking directorates."[19]

It is apparent, therefore, that Congress had under consideration several bills that would make the prohibition against interlocking directorates even more clear cut than the proposal that was enacted, but that it also had under consideration proposals to make a measurement of competitive effects of such interlocks more explicit. It chose neither route. The Clayton bill was managed through a course that rejected both extremes. This fact, perhaps, accounts for Judge Weinfeld's observation on the inconclusiveness of the legislative history.

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have interlocked directors. *See, e.g.*, S. 4647, Section 8, 63d Cong., 2d Sess. (1914); S. 1138, Section 1(d), 63d Cong., 1st Sess. (1913); S. 4747, Section 1(d), 62d Cong., 2d Sess. (1912). Other bills simply prohibited corporations with certain characteristics, which included interlocking directorates, from engaging in interstate commerce. *See, e.g.*, S. 1617, 63d Cong., 1st Sess. (1913); S. 5486, Section 5(10), 62d Cong., 2d Sess. (1912); S. 1377, Section 1, 62d Cong., 1st Sess. (1911). Other contemplated definition and proscription of "unfair trade practices," including interlocking directorates. *See, e.g.*, H.R. 15652, Section 21(g), 63d Cong., 2d Sess. (1914); H.R. 9300, Section 3, 63d Cong., 1st Sess. (1913). Still other bills proposed that a federal trade commission take action against objectionable interlocks. *See, e.g.*, H.R. 14799, 63d Cong., 2d Sess. (1914).

[12] *See, e.g.*, H.R. 7762, Section 1, 63d Cong., 1st Sess. (1913) (outright prohibition); H.R. 1773, Section 64, 63d Cong., 1st Sess. (1913) (prohibiting certain directors from serving as directors in more than four corporations).

[13] *See, e.g.*, S. 1138, Section 1(d), 63d Cong., 1st Sess. (1913); H.R. 11168, Section 1(g), 63d Cong., 2d Sess. (1913) ("similar or competing business"); H.R. 9763, Section 9, 63d Cong., 2d Sess. (1913) ("corporations . . . engaged in any line of business which compete with one another").

[14] *See, e.g.*, H.R. 28852, Section 1(c), 62d Cong., 3d Sess. (1913) ("substantially competing business or in any business of substantially the same kind").

[15] *See, e.g.*, H.R. 2488, Section 1(c)(2), 63d Cong., 1st Sess. (1913); *see also* S. 4647, Section 8, 63d Cong., 2d Sess. (1914) ("same or similar kind of interstate commerce").

[16] *See, e.g.*, S. 1617, 63d Cong., 1st Sess. (1913).

[17] *See, e.g.*, H.R. 12809, Section 3, 62d Cong., 1st Sess. (1911).

[18] *See, e.g.*, H.R. 15652, Section 21(g), 63d Cong., 2d Sess. (1914); H.R. 14799, Section 11(g), 63d Cong., 2d Sess. (1914).

[19] *See, e.g.*, H.R. 15652, Section 28(g), 63d Cong., 2d Sess. (1914); H.R. 14799, Section 18(g), 63d Cong., 2d Sess. (1914).

B. *House and Senate Hearings*

Part of the difficulty in interpreting the intent of Congress as to Section 8 is that the specific language of the Clayton bill was never the subject of debate in committee hearings. In the House Judiciary Committee hearings, there was considerable debate on a tentative bill that contained a "conclusive presumption" that director interlocks between competing corporations were unlawful. In the Senate committee hearings, there was substantial debate on a proposed amendment to the trade commission bill that would have required a measurement of "substantially competitive conditions." Neither of these proposals became law.

During hearings before both the House Judiciary Committee[20] and the Senate Interstate Commerce Committee,[21] members of Congress and those testifying had before them a bill labeled "No. 3—Committee Print—Tentative Bill," which was circulated by [7] Representative Clayton and Senator Newlands.[22] The bill's language was more explicit than that of the bill that finally emerged from committee:

> Sec. 4. That if, after two years from the date of the approval of this Act, any two or more corporations, engaged in whole or in part in interstate or foreign commerce, have a common director or directors, the fact of such common director or directors shall be conclusive evidence that there exists no real competition between such corporations; and if such corporations shall have been theretofore, or are, or shall have been, by virtue of their business and location of operation natural competitors, such elimination of competition thus conclusively presumed shall constitute a combination between the said corporations in restraint of interstate or foreign commerce . . . .[23]

In the Senate, however, Senator Newlands had introduced and circulated for comment at the Interstate Commerce Committee hearings another bill which he entitled, "Amendment in the Nature of a Substitute to S. 4160," the trade commission bill.[24] Discussion on interlocking directorates at the Senate hearings centered on the language in this bill, which provided as follows:

> Section 9. That no corporation shall engage in commerce, if, upon its board of directors or other managing board or among its officers, there is any person who is a member of the board of directors or other managing board, or one of the officers of another corporation engaged in commerce and carrying on a competitive business: *Provided, however,* That no suit or action, civil or criminal, shall be instituted to enforce this section against any corporation having such community of directors or officers which,

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[20] *Hearings Before the House Comm. on the Judiciary on Trust Legislation,* 63d Cong., 2d Sess. (1914) [hereinafter cited as *1914 House Hearings*].

[21] *Hearings Before the Senate Committee on Interstate Commerce on Bills Relating to Trust Legislation,* 63d Cong., 2d Sess. (1914) [hereinafter cited as *1914 Senate Hearings*].

[22] The bill is reprinted in *1914 House Hearings, supra* note 20, at 1577–79; *1914 Senate Hearings, supra* note 21, at 70; 2 E. Kintner, The Legislative History of the Federal Antitrust Laws and Related Statutes 1077–78 (1978).

[23] *Id.* Section 4.

[24] This bill is reprinted in *1914 Senate Hearings, supra* note 21, at 237.

within one year after the passage hereof, files with the commission, or, if a common carrier, with the Interstate Commerce Commission, a petition alleging that the business of the corporations [8] involved is *not in fact competitive, or that if competitive in any degree the community of directors or officers, or both does not destroy or impair substantially competitive conditions as to such corporations* (emphasis added).

Neither this clear rule-of-reason language nor the clear irrebutable presumption language of the other tentative bill became part of H.R. 15657, which ultimately became the Clayton Act.

C. *The Clayton Bill: House and Senate Reports and Debates*

Representative Clayton introduced H.R. 15657, Section 9 of which was the interlocking directorates provision that became Section 8 of the Clayton Act, ten days after the House Judiciary Committee concluded its hearings on the trust legislation.[25] The bill was the subject of this committee's House Report No. 627, which quoted President Wilson's pronouncements against interlocking directorates and cited Section 9 extensively, but which was quite unspecific in its description of the meaning and effect of this provision.[26]

The minority views in this report are somewhat more enlightening as to the committee members' perception of Section 9's meaning. In particular, Congressman Graham of Pennsylvania, who lauded the principle of this provision, inveighed against its scope and its failure to measure competitive effects:

> This provision, however, makes the bare possibility of "elimination of competition" the test of illegality, instead of the actuality of "eliminating or lessening of competition," which is the test adopted in the provision relating to holding companies [currently Section 7. Congressman Graham here continues his earlier criticism of the "eliminating or lessening of competition" language of Section 7.]
>
> The phase "so that an elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws" affords no protection, but exposes all directors in more than one corporation engaged in interstate commerce to the peril of violating the law, because the proposed bill will be a part of the antitrust laws of the United States, and in it the "elimination of competition," or the liability to eliminate or lessen competition, instead of the creation of a monopoly or a restraint of trade, would become the governing test by which directors would be judged. [9]
>
> Under existing laws, wherever interlocking directorates exist this fact can be shown, and if the interlocking tends to establish a monopoly or creates a monopoly or a restraint of trade, it can readily be reached and corrected and the evil removed. Neither the possibilities nor the actualities of "elimination of competition" ought to be substituted for "monopoly" or "restraint of trade" as the test of illegality.
>
> This section will be full of difficulty and peril for small corporations, and will affect them in far greater degree than it will larger ones, against which the legislation is

[25] The Committee concluded its hearings on April 4, 1914; Rep. Clayton introduced H.R. 15657 on April 14, 1914.

[26] *See* H.R. Rep. No. 627, pt. 1, at 17-20.

presumed to be aimed.[27]

Representative Graham's comments seem to have anticipated the specific direction that the courts would take in interpreting this provision of the Clayton Act, most notably the interpretation of the court in *United States v. Sears, Roebuck & Co.*[28]

The Senate Report on H.R. 15657 provided little explanation of this provision, but merely stated that the Senate Judiciary Committee was not proposing to change or amend in any respect the specific provision concerning interlocking directorates of industrial corporations.[29] The Committee did state, however, that the general purposes of the bill included preventing antitrust violations in their incipiency:

> Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890, or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation. Among other of these trade practices which are denounced and made unlawful may be mentioned . . . interlocking directorates.[30] **[10]**

The House passed H.R. 15657 on June 5, 1914, with little relevant discussion of Section 9 on the House floor. After the Senate Judiciary Committee reported out the bill with the recommended amendments on July 22, 1914, the debate of the full Senate included a rather lengthy discussion of the meaning of Section 9. Senator Cummins had proposed an amendment of Section 9 that would have made it read as follows:

> It shall be unlawful for any person to be, at the same time, a member of the board of directors, or other managing board, or an officer in two or more corporations, either of which is engaged in commerce, and which corporations are carrying on business of the same kind or competitive in character . . . .[31]

Senator Cummins' proposed language paralleled that of a bill he had introduced the previous year, which would have prevented corporations from engaging in interstate commerce if "there is, upon its board of directors or other managing board, any person who is upon the board of directors or other managing board of any other corporation carrying on a competitive business or a business of the same

[27] *Id.*, pt. 2, at 8 (minority views of Mr. Graham).

[28] 111 F.Supp. 614 (S.D.N.Y. 1953).

[29] S. Rep. No. 698, 63d Cong., 2d Sess. 48 (1914). The Committee did make one technical change to the language of Section 9, without explanation: "so that an elimination of competition by agreement between them. . ." became "so that *the* elimination of competition by agreement between them."

[30] *Id.* at 1.

[31] Amendment to H.R. 15657 by Mr. Cummins (Aug. 25, 1914), *reprinted in* 51 Cong. Rec. 14,534 (Sept. 1, 1914).

general character . . . ."[32]

Senator Cummins' remarks indicated his concern that the proposed language of Section 9 in the bill under debate added nothing to the existing antitrust laws. The most specific of his comments were as follows:

> That means, practically, that if a consolidation of the corporations would be a violation of the antitrust law, then interlocking directors are made unlawful. . . .
>
> If we have to prove that consolidation of the two corporations which are involved would be a violation of the antitrust law, we do not need any additional regulation of this sort. I want the regulation to go much farther and declare that if they are engaged in competition, if they are doing the same kind of business—and I am quite willing to take some form of language that expresses that idea—then there must not be this community of directors . . . .[33] [11]

There was no specific discussion of the correctness of Senator Cummins' view. The debate that ensued simply reiterated the same objections that had been raised in committee hearings about the propriety of barring interlocking directorates at all: there were benefits to be gained from interlocking directorates.[34] The court in *Sears* and a commentator[35] on that case took the view that Cummins' remarks could not be regarded as an expression of the Senate's understanding of the interlocking directorate provision:

> Senator Cummins was in the role of an advocate. His individual expression of views, clearly calculated to give weight to his contention as to the inadequacies of the proposed §8 and gain support for his amendment, may not be considered as representative of the understanding of the members of the House and Senate as to the meaning of the "so that" clause.[36]

The meaning of the statutory language and the substantive significance of the rejection of Senator Cummins' proposed amendment seems far from clear from the record of the debates.

The Senate passed H.R. 15657 on September 2, 1914. Because of the amendments made to the bill by the Senate, the bill was the subject of conference committee consideration; the conference committee

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[32] S. 1617, Section 3(a), 63d Cong., 1st Sess. (1913).

[33] 51 Cong. Rec. 14,256.

[34] *See, e.g.*, 51 Cong. Rec. 14,535 (remarks of Mr. Hitchcock) (men of experience can help establish businesses in new areas); *id.* at 14,537 (remarks of Mr. Overman) (directors with special skill are useful to more than one corporation); *id.* at 14,538 (remarks of Mr. Smith, Mich.) ("dummy directors" can evade statutory provisions).

[35] *See* Note, Clayton Act Prohibition of Interlocking Directorates in Industrial or Commercial Corporations, 54 Colum. L. Rev. 130, 131 (1954) (dispassionate interpretation unlikely in individual expression supporting substitute measure).

[36] *United States v. Sears, Roebuck & Co.*, 111 F.Supp. 614, 619 (S.D.N.Y. 1953). The court in *Sears* conducted a rather extended examination of the meaning of the legislative history, and noted that no committee report supported Sen. Cummins' reading, *id.* at 618; no member of the Senate stated his agreement or disagreement with Sen. Cummins' belief that consolidation was the only means by which competition might be eliminated within the meaning of Section 8, *id.*; and that it was as likely as not that Cummins' interpretation was not in accord with the understanding of the other Senators, that they did not see the difficulty that he saw, and that they, therefore, rejected his amendment because they saw no need for it. *Id.*

submitted its report on September 25. The Senate passed [12] the Clayton Act on October 5, 1914; the House did the same on October 8. The report and the debates on the compromise bill did not deal with the problem of the "so that" clause.

D. *The Problem of the Statutory Language as Seen by the Early Commentators*

The language of the "so that" clause of Section 8 remained virtually the same from its introduction by Congressman Clayton until its enactment into law. As enacted, the provision prevented interlocking directorates among any two or more corporations

> if such corporations are, or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.[37]

The obvious problem in this language is that a violation of the antitrust laws may occur in two basic ways involving different analytic principles: it may occur by merger or other arrangement which is analyzed through a projection of probable competitive effects; or it may occur by price fixing, which is analyzed under what has become known as the *per se* approach. Thus, if two firms fixed prices, such an "elimination of competition" between them would always constitute a violation of the antitrust laws; these same two firms, however, might very well not violate any of the provisions of any of the antitrust laws if they were to "eliminate competition" by merger.

Commentators recognized the problem shortly after passage of the statute. Then-attorney John Marshall Harlan, in a 1916 treatise, gave this description of the statute's meaning:

> [T]he exception to the rule forbidding interlocking directorates as to corporations within the operation of the Clayton Law, other than banks, is very indefinite and uncertain. . . . This obviously makes the lawfulness of interlocking directorates created by two such corporations, depend finally upon an interpretation of the antitrust laws. If the two corporations, being otherwise within the terms of the Clayton Law, are competitors so that elimination of competition between them by agreement would violate any provision of the antitrust laws, they may not lawfully have interlocking [13] directorates. Otherwise they may. It would be difficult to conceive a more uncertain and shifting standard of corporate conduct than this one, by which the question of what elimination of competition between two corporations by agreement would constitute a violation of the antitrust laws, is made the test of the lawfulness of an interlocking directorate between such corporations.[38]

An even more succinct description of the problem in Section 8 is

[37] Clayton Act Section 8, ch. 323, 38 Stat. 730 (1914), *current version at* 15 U.S.C. 19.

[38] J. Harlan & L. McCandless, The Federal Trade Commission: Its Nature and Powers 20 (1916).

contained in a classic 1924 treatise on the young Federal Trade Commission:

> The difficulty in applying the test lay in the fact that no one could state with assurance under what circumstance the elimination of competition by agreement would constitute a violation of the antitrust laws. It seemed to have been generally conceded, as we have seen, that if the agreement by which competition was eliminated comprised a transfer of property, and was made with a view to effecting economies, it was legal. There were dicta, on the other hand, that a bare agreement not to compete, without merger or sale, was illegal under any circumstances. Yet under the rule of reason, the test of illegality was the test of unreasonableness at common law, and by the weight of authority an agreement limiting competition between two concerns was not illegal at common law if they controlled between them so small a part of the field that it remained as a whole freely competitive. Since these agreements did not restrain the promissor entirely from carrying on his business, but merely limited "the mode or manner in which a trade is carried on," they were considered to be merely partial restraints, and to be lawful if reasonable and for good consideration. Yet in view of the dicta in the *Addyston Pipe* and *Dr. Miles Medical Company* cases, and of the emphatic opinion of the Chief Justice, it was not at all clear that this view of the common law would be carried over into the interpretation of the Sherman Law. It is unfortunate, to say the least, that the draftsmen of a statute designed to give clarity and definition to the law of restraints and monopolies, should have permitted the lawfulness of a common directorship to turn upon this highly controversial question.[39] **[14]**

The ultimate result of this controversy, of course, was one that these commentors perhaps could not have fully appreciated: a rule-of-reason approach for some antitrust violations and a *per se* approach for others. The place of Section 8 liability within this spectrum of views was thus initially open to debate, but, as will be seen, the courts addressed these analytic questions in subsequent years. One answer they gave was that the "agreement" between interlocked directorates could be one contemplated by the price-fixing prohibitions of the Sherman Act—the only other antitrust law extant when the Section 8 language was written. And expressly, as the Commission observes in its opinion here, courts rejected the Section 7 analytic analogy on the basis of a reading of the complete history of both statutes. Moreover, the courts have added that no actual Sherman Act agreement need be demonstrated, since potential violations of the law could be curbed in their incipiency through an outright ban on interlocking directorates between competing corporations.[40] In a nutshell, the courts have taken the view that the statute simply means what it says: if an agreement between interlocked directors would violate *any* of the antitrust laws, the interlock is unlawful.

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[39] G. Henderson, The Federal Trade Commission 38–39 (1924) (footnotes omitted).

[40] Such a broad proscription was applicable only to corporations other than banks and common carriers, which the Congress chose to regulate in a distinctly different manner. *See BankAmerica Corp. v. United States*, 51 U.S.L.W. 4685 (U.S. June 8, 1983).

E. *Subsequent Congressional Consideration*

Two major studies[41] of interlocking directorates have been undertaken in Congress since 1914, neither of which addressed the problem of the statutory language of Section 8, but both of which affirm a strict congressional attitude towards statutory liability.

The first, a study conducted by the staff of the Antitrust Subcommittee of the House Judiciary Committee in 1965, noted the *Sears* case and stated that it "establishes the test that is applicable when the ["so that" clause] is defined."[42] This report also explained the scope of Section 8 as follows: [15]

> The statute does not require a demonstration that competition in fact has been adversely affected. This provision seeks to avert a reduction in competition that exists between relatively large corporations. It is narrow in scope and is based on the virtually inescapable conclusion that meetings of directors under the conditions prohibited necessarily would impair the vigor of competition.[43]

The second congressional study was conducted by the staff of the Subcommittee on Reports, Accounting, and Management of the Senate Committee on Governmental Affairs.[44] The study described in detail the drawbacks and benefits of corporate interlocks,[45] and in its conclusion noted as follows:

> Such interlocking directorates among the Nation's very largest corporations may provide mechanisms for stabilizing prices, controlling supply and restraining competition. They can have a profound effect on business attempts to influence Government policies. They can impact on corporate decisions as to the type and quality of products and services to be marketed in the United States and overseas. They can influence company policies with respect to employee rights, compensation and job conditions. They can bear on corporate policies with respect to environmental and social issues and possibly, control the shape and direction of the Nation's economy.[46]

E. *Applicable Judicial Precedent*

As noted at the outset, Judge Weinfeld in the *Sears* case squarely faced the problem of the legislative history of Section 8, and found ample justification in that history to conclude that the purposes of the statute and the statutory language were susceptible of a *"per se"* approach. He reasoned that the "so that" clause was not a require-

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[41] These do not include a study prepared by the Federal Trade Commission for Congress in 1950. *See* Report of the Federal Trade Commission on Interlocking Directorates, H.R. Doc. No. 652, 81st Cong., 2d Sess. (1950).

[42] Staff of the Antitrust Subcomm. of the House Comm. on the Judiciary, Interlocks in Corporate Management 59 (Comm. Print 1965).

[43] *Id.* at 26.

[44] Interlocking Directorates Among the Major U.S. Corporations, 95th Cong., 2d Sess. (Comm. Print 1978).

[45] *See id.* at 3–9.

[46] *Id.* at 280–81.

ment that an anticompetitive agreement between interlocked directorates be proved or that anticompetitive effects of an interlocking directorate be demonstrated. He emphasized instead the "preventative [sic] nature of Section 8": [16]

> While the government does not charge that any such agreement has here been made or is contemplated, a director serving in a dual capacity might, if he felt the interests of an interlocking corporation so required, either initiate or support a course of action resulting in price fixing or division of territories or a combination of his competing corporations as against a third competitive corporation. The fact that this has not happened up to the present does not mean it may not happen hereafter.[47]

Judge (now Justice) Stevens, writing for the Court of Appeals for the Seventh Circuit in 1973 in *Protectoseal Co. v. Baranick,* 484 F.2d 585 (7th Cir. 1973), embraced the reasoning of Judge Weinfeld. Likewise, the Court of Appeals for the Ninth Circuit endorsed the *Sears* standard in its recognition of the prophylactic nature of the statute:

> The purpose of Section 8 was "to nip in the bud incipient antitrust violations by removing the opportunity or temptation for such violations through interlocking directorates."[48]

This line of authority is one described by the dissenters as "sparse, conflicting, and indeterminative." In contrast, I believe the Commission's decision on liability in this case is grounded on solid precedent, itself based on a careful consideration of the legislative history of this statute. There is, to be sure, evidence in this history of a diversity of contending views, but the statute reflects a deliberate choice of strict antitrust liability amply ratified by subsequent judicial examination of the chosen statutory proscription. "We are bound to respect that choice; we are not to rewrite the statute based on our notions of appropriate policy." *BankAmerica Corp. v. United States,* 51 U.S.L.W. 4685, 4690 (U.S. June 8, 1983).

F. *The De Minimis Commerce Issue*

The dissenting opinion suspends its skepticism of judicial precedent in its reliance on a 1966 decision, *Paramount Pictures Corp. v. Baldwin Montrose Chemical Co., Inc.,* 1966 Trade Cas. (CCH) ¶71,678 (S.D.N.Y. 1966). That district court decision, [17] which the Commission has acknowledged in its opinion, recognizes a *de minimis* exception.[49]

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[47] *United States v. Sears, Roebuck & Co.,* 111 F.Supp. 614, 620 (S.D.N.Y. 1953).

[48] *TRW, Inc. v. FTC,* 647 F.2d 942, 946–47 (9th Cir. 1981), *citing United States v. Crocker National Corp.,* 422 F.Supp. 686, 703 (N.D. Cal. 1976).

[49] The Commission's opinion and the dissenters add the *Sears* case to *Paramount* as one recognizing a *de minimis* exception. In *Sears,* however, the court's treatment of "the *de minimis* principle" appears directed more to whether there was sufficient interstate commerce upon which federal jurisdiction could constitutionally be grounded. The dissenters acknowledge this point.

It seems odd to me that if it can be concluded that Section 8 has *per se* applicability, it can be conceded on the basis of any remaining legislative history that there adheres to the statute a *de minimis* commerce exception in addition to the express requirement that corporate respondents have at least $1 million in sales.

But the Commission did not have to bootstrap itself into its rejection of a *de minimis* commerce exception to liability in this case. In *TRW, Inc. v. FTC,* 647 F.2d 942 (9th Cir. 1981), the court expressly disavowed such a defense. The dissenters argue only that the Ninth Circuit's judgment "was not necessary to the decision of the case," because the FTC opinion under review took the view that the *de minimis* competition issue did not really arise where the overlapping levels of commerce were as high as $1 million and $7 million. Of course, in the present case, the overlapping levels of commerce are $.9 to 1.1 million and $5.4 million, which fall into the same category as *TRW* (or, for that matter, *Protectoseal,* where the overlapping commerce did not exceed $1.5 million on either leg of the overlap). However, the court in *TRW* did not engage in a gratuitous disquisition on the law in this area; respondent TRW had argued on appeal that a *de minimis* defense applied to Section 8—an argument that the court rejected directly, but which the dissenters seek to resurrect here. The Commission, on the other hand, is merely following the precedent set (quite recently, in this instance) in its own *TRW* case—as indeed, it would be anomalous if it did not.

Conclusion

The dissent in this case argues for a sea change in the law applicable to interlocking directorates between competing corporations that would depart from the strict liability standard existing heretofore. The Commission has chosen in its opinion to eschew the dissenters' wish list, based on their convictions of appropriate antitrust policy, and to follow instead the well-posted road laid out by Section 8, its complete legislative history, subsequent congressional sentiment, and virtually all decided cases.

Final Order

This matter has been heard by the Commission upon the appeals of respondents and complaint counsel from the initial decision, and upon briefs and oral argument in support of and in opposition to the appeals. For the reasons stated in the accompanying opinion, the Commission has determined to deny the appeal as to respondents and as to complaint counsel. Accordingly,

It is ordered, That the findings of fact and initial decision of the

Administrative Law Judge be adopted insofar as not inconsistent with the findings of fact and conclusions of law contained in the accompanying opinion.

It is further ordered, That the following order to cease and desist be, and the same hereby is, entered: [2]

The following definitions shall apply in this order:

Bosch Corporation means Robert Bosch Corporation (Bosch U.S.), Robert Bosch GmbH (Bosch GmbH), their controlled subsidiaries, or the successors or assigns of either corporation.

Competitor means a corporation that by virtue of its business and location is in competition with the subject corporation, so that elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

I

It is ordered, That respondent Borg-Warner and its successors and assigns shall forthwith cease and desist from having, and in the future shall not have, any individual serve as a director who

(a) serves at the same time on the board of management and/or board of directors of any Bosch Corporation as long as such corporation is a competitor in the production or sale of any product or service with Borg-Warner; or

(b) serves at the same time on the board of directors and/or board of management of any corporation as long as such corporation is a competitor of Borg-Warner in the production or sale of automotive parts for the aftermarket, and as long as the revenues of either corporation derived from the product or service market or markets in which they are competitors exceed five million dollars; or

(c) fails to submit to Borg-Warner any statement required by paragraph IV of this order.

The requirements of this paragraph shall be effective for a period of ten (10) years from the effective date of this final order.

II

It is further ordered, That respondents Bosch GmbH and Bosch U.S. and their successors and assigns shall forthwith cease and desist from having, and in the future shall not have, on their board of management or board of directors any individual who

(a) serves at the same time on the board of directors of Borg-Warner, as long as Borg-Warner is a competitor in the production or sale of any

product or service with the Bosch Corporation on whose board the director sits; or [3]

(b) serves at the same time on the board of directors of any corporation as long as such corporation is a competitor of the Bosch Corporation on whose board the director serves in the production or sale of automotive parts for the aftermarket, and as long as the revenues of either competing corporation derived from the product or service market or markets in which they are competitors exceed five million dollars; or

(c) fails to submit to Bosch GmbH or Bosch U.S. any statement required by paragraph IV of this order.

The requirements of this paragraph shall be effective for a period of ten (10) years from the effective date of this final order.

III

It is further ordered, That respondent Hans L. Merkle shall forthwith cease and desist from serving, and in the future shall not serve, as a director both of Borg-Warner and of any Bosch Corporation that is a competitor of Borg-Warner. The requirements of this paragraph shall be effective for a period of ten (10) years from the effective date of this final order.

IV

It is further ordered, That within thirty (30) days of the effective date of this order, and prior to each election of directors or prior to the solicitation of proxies for such election, whichever is earlier, respondents Borg-Warner, Bosch GmbH, and Bosch U.S. shall obtain a written, certified statement from each member of their board of directors or board of management (except directors whose terms expire at the next election and who are not standing for reelection) and from each nominee for a directorship or seat on the board of management (who is not then a director) showing

(a) the name and home mailing address of each director or nominee; and

(b) the name and principal office mailing address of, and a listing of each product or service produced or sold by, each corporation that the director or nominee then serves as a director or has been nominated to serve as a director at the time of the statement.

Provided, however, That in complying with the provisions of paragraph IV(b), the information to be furnished to Bosch GmbH concerning its directors may be limited to those corporations engaged in

commerce within the United States and those products and services sold or offered for sale by such corporations within the United States. [4]

The requirements of this paragraph shall not apply to elections of directors occurring after ten (10) years from the effective date of this final order.

Nothing in this paragraph shall be construed to relieve respondents of their obligations under paragraphs II(a) and III(a) above due to any error or omission contained in any written statement received pursuant to this paragraph.

V

It is further ordered, That within forty-five (45) days of the effective date of this final order, and annually for a period of ten (10) years thereafter, respondents Borg-Warner, Bosch GmbH, and Bosch U.S. shall file with the Commission separate, written reports setting forth in detail the manner and form in which each has complied with this order. Copies of the statements obtained pursuant to paragraph IV of this order shall be submitted to the Commission as part of the reports of compliance required by this paragraph.

VI

It is further ordered, That respondents Borg-Warner, Bosch GmbH, and Bosch U.S. shall notify the Commission at least thirty (30) days prior to any change in the corporations or in their relationships to each other such as dissolution, assignment, or sale resulting in the emergence of successor corporations, the creation or dissolution of subsidiaries, or any other change in the corporations which may affect compliance obligations arising out of this order. The requirements of this paragraph shall be effective for a period of ten (10) years from the effective date of this final order.

Chairman Miller and Commissioner Douglas dissented.